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ABSTRACT

This document contains hearings on the regulations issued by the Department of Health, Education, and Welfare for the implementation of Title IX of Public Law 92-318. The main focus of Title IX is the ban on sex discrimination in any educational program or activity assisted by the federal government. The regulations will be reviewed solely to see if they are consistent with the law and with the intent of the Congress in enacting the law and to decide if the regulation writers have read and understood it the way the lawmakers intended it to be read and understood. Discussed is section 431(d) of the General Education Provisions Act, which sets forth the authority for the conduct of these hearings, and which says that the bureaucracy shall be held accountable and that its regulations will be scrutinized very carefully to see if they are consistent with the law. (Author/KE)

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ED118012

SEX DISCRIMINATION REGULATIONS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON POSTSECONDARY EDUCATION

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

REVIEW OF REGULATIONS TO IMPLEMENT TITLE IX OF PUBLIC LAW 92-318 CONDUCTED PURSUANT TO SEC. 431 OF THE GENERAL EDUCATION PROVISIONS ACT

HEARINGS HELD IN WASHINGTON, D.C.,
JUNE 17, 20, 23, 24, 25, 26, 1975

Printed for the use of the Committee on Education and Labor
CARL D. PERKINS, *Chairman*

HE 010 035

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SEX DISCRIMINATION REGULATIONS

TUESDAY, JUNE 17, 1975

House of Representatives,
Subcommittee on Postsecondary Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to notice, in room 2257, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Members present: Representatives O'Hara, Thompson, Mink, Chisholm, Andrews, Blouin, Simon, Mottl, Quie, Esch, Eshleman, Buchanan, and Smith.

Also present: Jim Harrison, staff director; Robert Andringa, minority staff director; Webster Buell, counsel; Richard Mosse, assistant minority counsel; Elnora Teets, clerk; and Karen Prince, assistant clerk.

Mr. O'Hara. The subcommittee will come to order.

This subcommittee is beginning hearings to review the regulations recently issued by the Department of Health, Education, and Welfare for the implementation of title IX of Public Law 92-318. The heart of title IX, is the ban on sex discrimination in any educational program or activity assisted by the Federal Government.

The regulations will be reviewed solely to see if they are consistent with the law and with the intent of the Congress in enacting the law. We are not meeting to decide whether or not there should be a title IX but solely to see if the regulation writers have read it and understood it the way the lawmakers intended it to be read and understood.

Because we will be taking testimony from a great many interested parties who have been asked to focus on that issue of consistency with the law, I think it would be inappropriate at this point for me to state my own tentative views on that issue. But there is one issue on which my views are not at all tentative and on which I am not in the least reluctant to announce them.

Section 431(d) of the General Education Provisions Act, which sets forth the authority for the conduct of these hearings, is, I believe, one of the most important steps this Congress has taken in recent years to return government to the people.

For all too long, the bureaucrats have assumed that the duty of the Congress was simply to make general policy and then to lean back and let the bureaucrats write the real law in the shape of regulations. And the Congress, for too many years, has been in the position of doing exactly that.

Section 431(d) says that the bureaucracy shall be held accountable and that its regulations will be scrutinized very carefully to see if they are consistent with the law from which they must draw all of their authority. The Congress, section 431(d) says, will return to making the law and the bureaucrats can return to carrying it out the way it was intended to be carried out when it was enacted.

Most of the people who have written to this subcommittee over the past several months asking to be heard when these hearings are scheduled have indicated their belief that the draft regulations in the several forms they have so far taken are inadequate. Some have suggested they do not carry out the law in its full vigor. Others have suggested they go beyond the limits of the law. Almost no one has written in so far to endorse the regulations as developed by HEW.

We will, then, review what the Department has done. We will lay it alongside the law and, if they don't jibe, we shall move to have the regulations changed through the method afforded us by the law—a concurrent resolution of disapproval.

At this point in the record, I would like to have printed the documentary background for this hearing, that is, the texts of title IX of Public Law 92-318, the text of section 431 of the General Education Provisions Act as amended, Secretary Weinberger's letter of June 4 transmitting the regulations, my letter inviting the Secretary to appear, and responding to some of the concerns he expressed in his communication, and, of course, the text of the regulations and other materials as they appeared in the Federal Register on June 4.

[Information referred to follows:]

TITLE IX—PROHIBITION OF SEX DISCRIMINATION

SEX DISCRIMINATION PROHIBITED

SEC. 901. (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from the date of enactment of this Act, nor for six years after such date in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex; and

(6) This section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) For purposes of this title an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(20 U.S.C. 1681) Enacted June 23, 1972, P.L. 92-318, sec. 901, 86 Stat. 373 374

FEDERAL ADMINISTRATIVE ENFORCEMENT

SEC. 902. Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

20 U.S.C. 1682) Enacted June 23, 1972. P.L. 92-318, sec. 902, 86 Stat. 374.

JUDICIAL REVIEW

SEC. 903. Any department or agency action taken pursuant to section 1002 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

(20 U.S.C. 1683) Enacted June 23, 1972, P.L. 92–318, 86 Stat. 374, 375.

PROHIBITION AGAINST DISCRIMINATION AGAINST THE BLIND

SEC. 904. No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any educational program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

(20 U.S.C. 1684) Enacted June 23, 1972, P.L. 92–318, sec. 904, 86 Stat. 375.

EFFECT ON OTHER LAWS

SEC. 905. Nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

(20 U.S.C. 1685) Enacted June 23, 1972, P.L. 92–318, sec. 905, 86 Stat. 375.

AMENDMENTS TO OTHER LAWS

SEC. 906. (a) Sections 401(b), 407(a)(2), 410, and 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000c(b), 2000c–6(a)(2), 2000c–9, and 2000h–2) are each amended by inserting the word "sex" after the word "religion".

(b)(1) Section 13(a) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)) is amended by inserting after the words "the provisions of section 6" the following: "(except section 6(d) in the case of paragraph (1) of this subsection)".

(2) Paragraph (1) of subsection 3(r) of such Act (29 U.S.C. 203(r)(1)) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

(3) Section 3(s)(4) of such Act (29 U.S.C. 203(s)(44) is amended by deleting "an elementary or secondary school" and inserting in lieu thereof "a preschool, elementary or secondary school".

INTERPRETATION WITH RESPECT TO LIVING FACILITIES

SEC. 907. Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

(20 U.S.C. 1686) Enacted June 23, 1972, P.L. 92–318, sec. 907, 86 Stat. 375.

GENERAL EDUCATION PROVISIONS ACT

SUBPART 2 ADMINISTRATION: REQUIREMENTS AND LIMITATIONS

Rules: Requirements and Enforcements

SEC. 431. (a) Rules, regulations, guidelines, or other published interpretations or orders issued by the Department of Health, Education, and Welfare or the Office of Education, or by any official of such agencies, in connection with, or affecting, the administration of any applicable program shall contain immediately following each substantive provision of such rules, regulations, guidelines, interpretations, or orders, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based.

(b)(1) No standard, rule, regulation, or requirement of general applicability prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

(2)(A) During the thirty-day period prior to the date upon which such standard, rule, regulation, or general requirement is to be effective, the Commissioner shall, in accordance with the provisions of section 553 of title 5, United States Code, offer any interested party an opportunity to make comment upon, and take exception to, such standard, rule, regulation, or general requirement and shall reconsider any such standard, rule, regulation, or general requirement upon which comment is made or to which exception is taken.

(B) If the Commissioner determines that the thirty-day requirement in paragraph (1) will cause undue delay in the implementation of a regulation, thereby causing extreme hardship for the intended beneficiaries of an applicable program, he shall notify the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate. If neither committee disagrees with the determination of the Commissioner within 10 days after such notice, the Commissioner may waive such requirement with respect to such regulation.

(c) All such rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States.

(d)(1) Concurrently with the publication in the Federal Register of any standard, rule, regulation, or requirement of general applicability as required in subsection (b) of this section, such standard, rule, regulation, or requirement shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such standard, rule, regulation, or requirement shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the Act from which it derives its authority, and disapprove such standard, rule, regulation, or requirement.

(2) The forty-five-day period specified in paragraph (1) shall be deemed to run without interruption except during periods when either House is in adjournment sine die, in adjournment subject to the call of the Chair, or in adjournment to a day certain for a period of more than four consecutive days. In any such period of adjournment, the forty-five days shall continue to run, but if such period of adjournment is thirty calendar days, or less, the forty-five-day period shall not be deemed to have elapsed earlier than ten days after the end of such adjournment. In any period of adjournment which lasts more than thirty days, the forty-five-day period shall be deemed to have elapsed after thirty calendar days has elapsed, unless during those thirty calendar days, either the Committee on Education and Labor of the House of Representatives, or the Committee on Labor and Public Welfare of the Senate, or both, shall have directed its chairman, in accordance with said committee's rules, and the rules of that House, to transmit to the appropriate department or agency head a formal statement of objection to the proposed standard, rule, regulation, or requirement. Such letter shall suspend the effective date of the standard, rule, regulation, or requirement until not less than twenty days after the end of such adjournment, during which the Congress may enact the concurrent resolution provided for in this subsection. In no event shall the standard, rule, regulation, or requirement go into effect until the forty-five-day period shall have elapsed, as provided for in this subsection, for both Houses of Congress.

(e) Whenever a concurrent resolution of disapproval is enacted by the Congress under the provisions of this section, the agency which issued such standard, rule, regulation, or requirement may thereafter issue a modified standard, rule, regulation, or requirement to govern the same or substantially identical circumstances, but shall, in publishing such modification in the Federal Register and submitting it to the Speaker of the House of Representatives and the President of the Senate, indicate how the modification differs from the proposed standard, rule, regulation, or requirement of general applicability earlier disapproved, and how the agency believes the modification disposes of the findings by the Congress in the concurrent resolution of disapproval.

(f) For the purposes of subsections (d) and (e) of this section, activities under sections 404, 405, and 406 of this title, and under title IX of the Education Amendments of 1972 shall be deemed to be applicable programs.

(g) Not later than sixty days after the enactment of any part of any Act affecting the administration of any applicable program, the Commissioner shall submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate a schedule in accordance with which the Commissioner has planned to promulgate rules, regulations, and guidelines implementing such Act or part of such Act. Such schedule shall provide that all such rules, regulations, and guidelines shall be promulgated within one hundred and eighty days after the submission of such schedule. Except as is provided in the following sentence, all such rules, regulations, and guidelines shall be promulgated in accordance wtih such schedule. If the Commissioner finds that, due to circumstances unforeseen at the time of the submission of any such schedule, he cannot comply with a schedule submitted pursuant to this subsection, he shall notify such committees of such findings and submit a new schedule. If both such committees notify the Commissioner of their approval of such new schedule, such rules, regulations, and guidelines shall be promulgated in accordance with such new schedule.

(20 U.S.C. 1232) Enacted April 13, 1970, P.L. 91-230, Title IV, sec. 401(a) (10), 84 Stat. 169; renumbered June 23, 1972, P.L. 92-318, sec. 301(a)(1), 86 Stat. 326, amended August 21, 1974, P.L. 93-380, sec. 509(a), 88 Stat. 566, 568.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., June 4, 1975.

Hon. CARL B. ALBERT,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Attached is a copy of the following document which has been transmitted to the *Federal Register:*

Final Regulation under Title IX of P.L. 92-318, as approved by the President.

This document is being transmitted to you in accordance with the procedure set forth in section 431(d) of the General Education Provisions Act, as amended by section 509(a)(1) of P.L. 93-380 (H.R. 69), signed into law on August 21, 1974, by the President. Section 431(d) provides that published regulations regarding various aid to education programs administered by the Department shall become effective not less than forty-five days following the date of their transmission to the Speaker of the House of Representatives and the President of the Senate, subject to the provisions contained in that section regarding Congressional action and adjournment. Regulations under Title IX of P.L. 92-318 are specifically included under this procedure. Since the proposed rule under Title IX was published prior to the enactment of section 431(d), and was, therefore, not transmitted, the final regulation is being transmitted under section 431(d). The effective date of the regulation is July 21, 1975.

I feel obligated to indicate our continuing reservations as to the validity of certain provisions of section 431(d), as we understand its operation.

In the statement which accompanied his signing of H.R. 69, the President observed that provisions in the Act calling for Congressional review and possible veto of administrative and regulatory decisions of this Department were questionable on practical as well as constitutional grounds. Section 431(d) is one of these provisions. We continue to believe that this provision raises substantial constitutional questions.

In light of the widespread interest in the Title IX regulation, we anticipate that the coverage, exclusion or treatment of various matters may be the subject of intense consideration by Congress. If Congress determines that a course different from that set forth in the regulation is warranted, then we believe that it should proceed by way of amendatory or clarifying legislation rather than by concurrent resolution aimed at deferring the effectiveness of a particular provision of these rules. Whatever the constitutional validity of section 431(d), it is our view that section 431(d) is largely ineffective other than requiring a forty-five day waiting period. If the final Title IX regulation is within the present statutory authority, section 431(d) would not by its terms apply since Congressional disapproval is limited to a matter "inconsistent with the act from which it derives its authority." While we recognize that Congress and the Executive might differ on the legality of a particular standard in the Title IX regulation, we believe that any such Congressional judgment might be challenged in the courts by a party supporting the position in the Title IX regulation as transmitted. Further, the Department would be on untenable legal grounds if it were to accede to the views of Congress expressed in a concurrent resolution on a matter which we believe must be covered under the present statute.

Indeed, some of the most sensitive matters in the Title IX regulation relate to positions which we believe are required by the Title IX statute and which would, therefore, not be susceptible to alteration by concurrent resolution. In short, while we can conceive of reasonable differences as to policy alternatives to be followed, and while we believe that far greater specificity in the statute would have been desirable, we think that nothing but confusion and delay in meeting the legitimate expectations of millions of citizens can be engendered by an attempt of the Congress to perform its proper legislative function through a concurrent resolution rather than the constitutional procedure for enacting legislation.

We will, of course, review any proposed legislative changes introduced in Congress, and provide our comments, and will amend the final Title IX regulation as necessary in accordance with any such changes enacted into law by the procedures prescribed in the Constitution for such enactment.

Sincerely,

CASPAR W. WEINBERGER,
Secretary.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 16, 1975.

Hon. CASPAR WEINBERGER,
Secretary, Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. SECRETARY: This is to confirm the invitation telephoned to the Department by the Subcommittee, requesting that you or a member of your staff appear on June 26th at 9:30 a.m. in Room 2175 Rayburn House Office Building, to testify before the Subcommittee regarding the regulations promulgated by the Department, and submitted by you to the Speaker by your letter of June 4, 1975. I am also confirming the understanding set forth in the second paragraph of that letter, that these hearings are being held in accordance with the procedure set forth by law in Section 431(d) of the General Education Provisions Act.

I am aware, of course, of the reservations the Department feels with regard to Section 431(d) and the procedure set forth by that provision of law. Those objections have been stated in every letter of submission the Department has sent to the Congress whenever regulations have been issued subsequent to August 21, 1974. But your letter of June 4 expresses those reservations in a more explicit fashion, and as author of the statutory provision involved, it may well be appropriate for me to respond to your concerns.

For the most part, your letter seems to express a concern that the Congress will use the Section 431(d) procedure in an effort to "defer the effectiveness" of regulations which are within the statutory authority the Congress conferred upon the Department when it enacted Title IX. That concern should be alleviated by a reading of Section 431(d). Under the procedure established therein, we may only review the regulations to determine if they are consistent with the law from which they derive all of their authority. And we may only return them if they are nonconsistent with that law. Section 431(d) affords no alternative to the exercise of the legislative function of the Congress. It merely seeks to guard against the temptation which the regulation-writing process always presents to the agencies to seek to share in that legislative function.

Obviously, there may be differences of opinion between the agency and the Congress as to what the Congress intended when it wrote the law. And, as you have frequently made clear, there is ample room for difference of opinion between the agency and the Congress as to what the Congress *should* have done when it wrote the law. But the law, as written, is the law as it applies, whether or not any of us, individually, happens to like it. And if you are not sure what the Congress meant, the Congress' own opinion as to its intention when it enacted the law should be definitive. If I want to know what an Executive official means when he says something, I will accept his explanation. Section 431(d) gives the Congress an opportunity to let you know if you have interpreted its intentions correctly. It goes no further than that.

Should the case you fear arise, and the Congress finds that it intended something other than what you believe it intended, I would not think you would be on "untenable legal grounds" in doing what the Congress says to do. In fact, I think you might find yourself on the soundest legal grounds the Executive Branch has been on in many years by following that simple procedure.

If any of us in the Congress believe the law should be changed, we would of course proceed to introduce legislation, consider it through the procedures prescribed in the Constitution, listen to whatever comments you or other interested parties wished to offer, and change the law. But, as I point out, that is not what we are doing here. We are not considering the law. We are looking at regulations.

Very truly yours,

JAMES G. O'HARA, *Chairman.*

[From Federal Register, June 4, 1975]

TITLE 45—PUBLIC WELFARE

SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

1

On June 20, 1974, the Office for Civil Rights of the Department of Health, Education, and Welfare gave notice of proposed rulemaking to the effect that it intended to add Part 86 to the Departmental regulation to effectuate title IX of the Education Amendments of 1972 (20 U.S.C. sections 1681 et seq.), except sections 904 and 906 thereof (20 U.S.C. 1684 and 1686), with regard to Federal financial assistance administered by the Department (39 FR 22228). Title IX provides that "No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," with certain exceptions. Title IX is similar to title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) except that title IX applies to discrimination based on sex, is limited to education programs and activities, and includes employment. Title IX is also similar to, but independent of, sections 799A and 845 of the Public Health Service Act which, in effect, proscribe discrimination on the basis of sex in admissions to certain health training programs (42 U.S.C. 295h-9 and 42 U.S.C. 298b-2).

2

Interested persons were given until October 15, 1974, in which to submit written comments, suggestions, or objections regarding the proposed regulation. The Department received over 9700 comments, suggestions or objections and, after consideration of all relevant matter presented by interested persons, the regulation as proposed is hereby adopted, subject to changes as reflected herein.

3

EFFECTIVE DATE

This regulation has been signed by the Secretary of Health, Education, and Welfare and approved by the President. It will be transmitted to Congress pursuant to section 431(d)(1) of the General Education Provisions Act, as amended by section 509(a)(2) of the Education Amendments of 1974 (Pub. L. 93-380, 88 Stat. 567). The regulation will become effective on July 21, 1975.

SUMMARY OF REGULATIONS

4

Subpart A of this regulation (§§ 86.1 through 86.9) includes definitions and provisions concerning: remedial and affirmative actions, self-evaluation, required assurances, dissemination of information policies, and other general matters related to discrimination on the basis of sex. The Subpart also explains the effect of state and local laws and other requirements.

5

Subpart B (§§ 86.11 through 86.17) describes the educational institutions and other entities, whether public or private, which are covered in whole or in part by the regulation. It also includes exemptions as to the admissions practices of certain educational institutions and an exemption as to the membership practices of social fraternities and sororities, the Boy Scouts, Girl Scouts, Camp Fire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. This Subpart defines "admissions," and describes certain educational institutions which are eligible to submit transition plans designed to convert their single-sex admissions processes to non-discriminatory processes over a stated period of time not to exceed seven years from the date of enactment of title IX (*i.e.*, by June 24, 1979). The exemptions for the admissions practices of certain educational institutions are set forth in § 901 (a) of title IX as originally passed by Congress in Pub. L. 92–318. The exemption for the membership practices of the aforementioned youth organizations was inserted into title IX by § 3(a) of Pub. L. 93–568, signed by the President on December 31, 1974.

6

Subpart C (§§ 86.21 through 86.23) sets forth the general and particular prohibitions with respect to nondiscrimination based on sex in admissions policies and admission preferences, including requirements concerning recruitment of students. The regulatory requirements regarding treatment of students and employment (Subparts D and E) are applicable to all educational institutions receiving Federal financial assistance, including those whose admissions are exempt under Subpart C.

7

Subpart D (§§ 86.31 through 86.42) sets forth the general rules with respect to prohibited discrimination in educational programs and activities. The specific subject matter covered in Subpart D includes discrimination on the basis of sex in academic research, extracurricular and other offerings, housing, facilities, access to programs and activities, financial and employment assistance to students, health and insurance benefits for students, physical education and instruction, athletics, discrimination based on the marital or parental status of students and portions of classes dealing with sex education. The regulation explicitly does not affect the use of particular textbooks or curricular materials.

8

Subpart E (§§ 86.51 through 86.61) sets forth the general rules with respect to employment in educational programs and activities. The specific subject matters covered are: discrimination on the basis of sex in hiring and employment criteria, recruitment, compensation, job classification and structure, promotions and terminations, fringe benefits, consideration of marital or parental status, leave practices, advertising, and pre-employment inquiries as to marital or parental status. It also includes provisions for exemptions where sex is a bona fide occupational qualification.

9

Subpart F (§ 86.71) sets forth the interim procedures which will govern the implementation of the regulation by incorporating by reference the Department's procedures under title VI of the Civil Rights Act of 1964.

10

SCOPE OF APPLICATION

Section 86.11, in Subpart B, provides that the regulation applies "to each education program or activity which receives or benefits from Federal financial assistance" administered by the Department. Under analogous cases involving constitutional prohibitions against racial discrimination, the courts have held that the education functions of a school district or college include any service facility, or program which it operates or sponsors, including athletics and other extracurricular activities. These precedents have been followed with regard to sex discrimination; *see Brenden* v. *Independent School District 742*, 477 F. 2d 1292

11

(8th Cir. 1973).

Title IX requires in 20 U.S.C. 1682, that termination or refusal to grant or continue such assistance "shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found." The interpretation of this provision in title IX will be consistent with the interpretation of similar language contained in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d–1). Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance. This interpretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they "are infected by a discriminatory environment * * *" *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F. 2d 1068, 1078–79 (5th Cir. 1969).

A more detailed discussion of various sections in each of the Subparts of the title IX regulation is set forth in the following paragraphs. In certain cases, major issues and the reasons for the final language are discussed.

SUBPART A—CHANGES

13

Section 86.1—The statement of purpose is amended by adding the words "whether or not such program or activity is offered or sponsored by an educational institution as defined in this part."

14

Paragraph 86.2(a)—The definition of "title IX" as used in the regulation is amended by adding "except §§ 904 and 906 thereof." The U.S. Code citation has been appropriately amended to reflect this change.

15

Paragraph 86.2(j)—The definition of "local education agency" is amended to include the following parenthetical abbreviation: "L.E.A."

16

Section 86.3—Remedial and affirmative action and self-evaluation. Paragraph (a) of this section is amended to read as follows:

If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

17

Paragraph (b) of this section is amended by adding the sentence "Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246."

In addition, paragraphs (c) and (d) of this section have been added. Paragraph (c) requires recipients within a year of the effective date of the regulation to evaluate their policies and practices and the effects thereof in terms of the requirements of the regulation, to modify any of these policies and practices which do not or may not meet the requirements of the regulation, and to take appropriate remedial action to eliminate the effects of any discrimination which resulted or may have resulted from adherence to them. Paragraph (d) requires that the recipient maintain for at least three years from completion of the evaluation made pursuant to paragraph (c) a description of any modifications made and any remedial actions taken pursuant to paragraph (c).

18

Section 86.4(a)—The general description of assurances required is amended to add the following:

An assurance of compliance with this Part shall not be saitsfactory to the Director if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

19

Paragraph 86.6(a)—The paragraph concerning the effect of this regulation on other Federal provisions is amended to add the words "and do not alter" immediately prior to the word "obligations" in the proposed regulation.

20

Section 86.8—The section concerning designation of a responsible employee is amended as follows: The section as it appeared in the proposed regulation is redesignated as paragraph 8;.8(a) and is amended by adding, at the end of the section as it appeared in the proposed regulation, the sentence: "The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph." A second paragraph designated paragraph 86.8(b) is added to read:

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this Part.

21

Section 86.9—The section on dissemination of policy has been amended as follows: Subparagraph 86.9(a)(1) is amended by adding the words "and parents of elementary and secondary students" folowing the word "students," and by adding the words "and all unions or professional organizations holding collective bargaining or professional agreements" before the words "with the recipient."

ANALYSIS

22

Although a number of changes were made in Subpart A, most of these changes may be viewed as clarifications rather than as substantive alterations. One substantive change was made in § 86.3 where two new paragraphs concerning self-evaluation have been added. The Secretary believes that many of the discriminatory policies and practices now adhered to continue largely because hte institutions responsible for them are unaware of their existence. Accordingly, the Secretary believes that the requirement that recipients conduct an initial inquiry into their activities will enable them to identify and to eliminate much discrimination without the intrusion of the Federal government. In addition, where a compliance review reveals noncompliance, the Department will be able to take into account in determining necessary corrective action to be taken by a recipient the actions already being taken by the recipient to further equal opportunity and to achieve full compliance with title IX and the regulation pursuant to their self-evaluation.

An additional substantive change was made in § 86.8 where the regulation now requires recipients to establish grievance procedures (§ 86.8(b)). The Secretary believes that the establishment of grievance procedures by recipients will facilitate compliance and prompt correction of complaints with resort to Federal involvement.

The regulation leaves up to the recipient the choice of having one central grievance procedure or of establishing individual procedures on different campuses if that is appropriate.

23

Other than as noted above, the content of Subpart A remains substantively close to that in the proposed rule. § 86.2 is especially important since it provides definitions applicable throughout the regulation. Of particular note is § 86.2(o) which provides that where an educational institution is composed of more than one school, department or college, admission to which is independent of admission to any other component, each such school, department or college is considered as a separate unit for the purposes of determining whether its admissions are covered by the regulation. Thus, if a private institution is composed of an undergraduate and a graduate college, admissions to the undergraduate college are exempt (see discussion under Subpart B below), but admissions to the graduate school are not.

24

Paragraph 86.3(a) requires remedial action to overcome the effects of previous discrimination based on sex which has been found or identified in a Federally assisted education program or activitiy. Remedial action pursuant to paragraph 86.3(a) is restricted to those areas of a recipient's education program or activity which are not exempt from coverage. Paragraph 86.3(b) permits, but does not require, affirmative efforts to overcome the effects of conditions which have resulted in limited participation in all or part of a recipient's education program or activity by members of either sex. Moreover, the affirmative efforts referred to in paragraph 86.3(b) do not alter any obligations which a recipient may have as a Federal contractor pursuant to Executive Order 11246.

25

Section 86.4 requires each recipient of Federal financial assistance to submit to the Director an assurance that each of its education programs and activities receiving or benefiting from such assistance will be administered in compliance with the regulation. Such an assurance will be considered unsatisfactory if, at any time after it is given, the recipient fails to take any remedial action found necessary to correct discrimination or the effects thereof.

SUBPART B—CHANGES

26

Section 86.12 is amended as follows:

Paragraph 86.12(b) concerning the claiming of an exemption based on religion is amended to read:

(b) *Exemption*. An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this Part which conflict with a specific tenet of the religious organization.

27

Sections 86.14 through 86.16 are redesignated as §§ 86.15 through 86.17. A new § 86.14 is added dealing with membership practices of social fraternities and sororities, YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls and certain voluntary youth organizations. A new paragraph 86.15(a), reflecting the specific language of subparagraph 901(a)(2) of the Statute, is added specifying that the regulation does not apply to the admissions practices of educational institutions prior to June 24, 1973, which is one year from the date of enactment of title IX.

ANALYSIS

28

Three changes were made in Subpart B of which two might be considered substantive: The procedure for obtaining an exemption from the coverage of title IX because of conflict between the statutory requirements and the religious tenets of a recipient or its controlling organization have been modified and simplified. An educational institution now need only submit a statement by its highest ranking official identifying the provisions of the regulation which conflict with the tenets of the religious organization involved. The most notable substantive change in Subpart B, however, is the addition of a new § 86.14 which essentially incorporates the provisions of the recently enacted "Bayh Amendment" to title IX. The amendment, which is found at § 3 of Pub. L. 93-568, exempts from the requirements of title IX and, hence, of this regulation, the membership policies and practices of certain organizations which, though educational in nature or assisted by an education institution, have traditionally restricted their membership to members of one sex. It is important to note that, with respect to fraternal organizations, both the amenment and the regulation limit their exemption to fraternities and sororities of a social nature. Thus, membership policies of business and other professional fraternities and sororities may be subject to coverage either if they themselves receive Federal financial assistance in connection with an education program or activity of if they fall within the ambit of subparagraph 86.31 (b)(7) under which recipients are prohibited from providing significant assistance to agencies, organizations or persons which discriminate on the basis of sex.

29

Apart from the changes noted immediately above, Subpart B remains substantively the same as it appeared in the proposed regulation. Section 86.12 provides that the regulation does not apply to religiously controlled institutions to the extent that such application would be inconsistent with the religious tenets of the controlling organization. Section 86.13 of the regulation provides that all public and private military schools which are recipients of Federal financial assistance, whether secondary or postsecondary, are exempt from coverage. Neither the statute nor the regulation applies to United States military and merchant marine academies since these schools are Federal entities rather than recipients of Federal assistance.

30

The statute covers admissions in only certain institutions: vocational, professional, graduate, and public undergraduate institutions, except such of the latter as from their founding have been traditionally and continually single-sex. The admissions policies of private undergraduate institutions are exempt. Under the statute and § 86.15, the admissions requirements do not apply, in general, to admissions to public or private preschool, elementary and secondary schools. Because the statute mandates such coverage as to vocational schools, however, admission to public or private vocational schools, whether at the junior high school, high school or post-secondary level, is covered by paragraph 86.15(c) and must be nondiscriminatory. With respect to coverage of admissions to institutions of professional and vocational education, the Secretary has interpreted the statute as excluding admissions coverage of professional and vocational programs offered at private undergraduate schools. Thus, admission to programs leading to a first degree in fields such as teaching, engineering, and architecture at such private colleges will be exempt under paragraph 86.15(d). A number of comments were received urging the Secretary to change his interpretation of the statute in this area. Even after reassessing the Department's position on this issue, the Secretary believes that Congress did not address the overlap between the term "professional" and the term "undergraduate." Thus, the Secretary remains convinced that, while that section of the statute pertaining to admissions might be read as including professional degrees wherever they are offered, the statute can also be read as stating that admissions to private undergraduate schools were to be totally exempt. The exemption in paragraph 86.15(d) for admissions to public traditionally and continually single-sex undergraduate institutions will affect only a few institutions. Likewise, § 86.16 of the regulation, concerning transition by single-sex institutions whose admissions are covered by the statute into institutions with nondiscriminatory admissions practices, will affect relatively few institutions.

SUBPART C—CHANGES

31

Section 86.21—Subparagraph 86.21(b)(2) is amended to include the words "and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable" following the paragraph as it appeared in the proposed regulation. That section is further amended by omitting the words "successful completion of" and inserting the words "success in."

32

Subparagraphs 86.21(c) (2) and (3) are amended by deleting the words "miscarriage, abortion" and inserting in lieu thereof the words "termination of pregnancy."

33

Subparagraph 86.21(c)(4) is amended by deleting the term "Ms."

34

Section 86.23—Paragraph 86.23(a) is amended to read as follows:

(a) *Nondiscriminatory recruitment.* A recipient to which this Subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

ANALYSIS

35

Neither of the two changes in Subpart C is substantive. The amendment to subparagraph 86.21(b)(2) clarifies a principle which provoked some confusion in the comments.

Both that change and the revision of paragraph 86.23(a) reflect an effort to conform the provisions of the regulations dealing with students and those dealing with employees. Apart from these changes, the substance of Subpart C remains unchanged and generally prescribes (subject to the appropriate admissions exemptions) requirements for nondiscrimination in recruitment and admission of students to education programs and activities. In addition to a general prohibition of discrimination in paragraph 86.21(a), the regulation delineates, in paragraph 86.21(b), specific prohibitions based on sex relating to such practices as ranking of applicants, application of quotas, and administration of tests or selection criteria. Use of tests for admission which are shown to have a disproportionately adverse effect on members of one sex must be shown validity to predict success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect must be shown to be unavailable (subparagraph 86.21(b)(2)). Further, in connection with this prohibition, § 86.22 of the regulation forbids a recipient from giving preference to applicants on the basis of their attendance at particular institutions if the preference results in discrimination on the basis of sex. Such preferences may be permissible under that section, however, if the granting institution can show that the pool of applicants eligible for such preferences includes roughly equivalent numbers of males and females, or it can show that the total number of applicants eligible to receive preferences is insignificant in comparison with its total applicant pool.

36

Specific prohibitions in Subpart C also forbid applying rules concerning such matters as marital or parental status in a manner which discriminates in admissions on the basis of sex (subparagraph 86.21(c)(1). Subparagraph 86.21(c)(2) prohibits discrimination on the basis of pregnancy and related conditions, and subparagraph 86.21(c)(3) provides that recipients shall treat disabilities related to such conditions in the same manner and under the same policies as any other temporary disability or physical condition is treated. Finally, in addition to the provisions of § 86.23 discussed above, a recipient may not, under paragraph 86.23(b), recruit primarily or exclusively at institutions the student bodies of which are exclusively or predominantly single-sex if the effect of such recruitment efforts is to discriminate on the basis of sex.

SUBPART D—CHANGES

37

Section 86.31, concerning education programs and activities, is amended as follows:

38

Subparagraph 86.31(b)(6) is amended by adding after the word "behavior" the word "sanctions."

39

Subparagraph 86.31(b)(6) is amended by adding after the word "applicant" the words "including eligibility for in-state fees and tuition."

40

Subparagraph 86.31(b)(7) is amended to read as follows:

(b)(7) aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

Paragraph (c) is redesignated as paragraph (d) and a new paragraph (c) is inserted to read as follows:

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, a recipient educational institution which administers or assists in the administration of such scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

41

Subparagraph 86.31(d)(2)(i) is amended by deleting the word "ensure" appearing in the second line of the proposed regulation and substituting therefor the words "assure itself."

42

Subparagraph 86.32(c)(2) is amended after the word "students" in line 5 of the paragraph as it appeared in the proposed regulation to read as follows: "shall take such" reasonable action as may be necessary to assure itself that such housing * * *

The remainder of the paragraph is unchanged.

43

Paragraph 86.34(a) is redesignated as § 86.34 and is amended further by adding six subparagraphs containing language:

(a) Providing adjustment periods with respect to classes and activities in physical education;

(b) Allowing grouping of students in physical education classes and activities by ability;

(c) Allowing separation of students by sex within physical education classes and activities during participation in contact sports;

(d) Requiring use of standards for measuring skill or progress in physical education classes which do not adversely affect members of one sex;

(e) Allowing portions of classes in elementary and secondary schools which deal exclusively with human sexuality to be conducted separately for boys and girls; and

(f) Allowing recipients to offer a chorus or choruses composed of members of one sex or predominantly composed of members of one sex if those choruses are based on vocal range or quality.

44

Paragraph 86.34(b) is redesignated as § 86.35 and retitled "Access to schools operated by L.E.A.s."

45

Paragraph 86.34(c) is redesignated as § 86.36 to read as follows:

§ 86.36 *Counseling and use of appraisal and counseling materials.*

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as in necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that the enrollment of a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

46

Paragraph 86.35(a) is redesignated as § 86.37 and the new section includes four paragraphs which include language:

(a) Generally prohibiting recipients from limiting eligibility for or providing different financial assistance to students on the basis of sex or from assisting outside organizations or persons which so discriminate in providing assistance, and from applying any rules or assisting in the application of any rules which treat members of one sex differently from members of the other sex on the basis of marital or parental status;

(b) Specifically allowing recipients to administer or assist in administration of sex-restrictive scholarships, fellowships or other forms of financial assistance established under a domestic or foreign will, trust, bequest or other similar instrument, if the overall administration is nondiscriminatory;

(c) Requiring the provisions of reasonable opportunities to receive athletic scholarships or grants-in-aid in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics, but allowing separate financial assistance for members of each sex provided in connection with separate athletic teams to the extent those teams are permitted under this regulation.

47

A new § 86.38 is added which is entitled "Employment assistance to students." The new section includes two paragraphs: Paragraph 86.35(b) becomes paragraph 86.38(a). Paragraph 86.35(c) is redesignated as paragraph 86.38(b).

48

Section 86.36 is redesignated as § 86.39 and is amended by adding at the end of the section as it appeared in the proposed regulation the sentence "However, any recipient which provides full coverage health service must provide gynecological care."

50

Paragraph 86.40(b) is amended to include five subparagraphs containing language:

1. Prohibiting discrimination against or exclusion of pregnant students from an education program or activity unless the student voluntarily requests to participate in a separate portion of the program or activity of the recipient;

2. Allowing a recipient to require a pergnant student to obtain a certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions;

3. Allowing recipients to offer separate instruction for pregnant students so long as admittance to such instruction is voluntary and provided such instruction is comparable to that offered to nonpregnant students;

4. Requiring recipients to treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom like any other temporary disability; and

5. Where a recipient does not maintain a temporary disability policy for the student or where a student does not qualify for leave, the recipient must treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom as a justification for a medical leave of absence at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

51

Paragraph 86.38(b). "Determination of student interest," and paragraph 86.38(c), "Affirmative efforts," of the proposed regulation have been deleted. Section 86.38 is redesignated as § 86.41 and is further amended to include language:

(a) Prohibiting discrimination by a recipient in any interscholastic, intercollegiate, club, or intramural athletics.

(b) Allowing separate teams when those teams are based on competitive skill or if they are in contact sports, but requiring that if a team is provided for members of one sex and not for the other in a non-contact sport and athletic opportunities for the sex for whom a team is not provided have previously been limited, members of that sex be allowed to try-out for the team offered. (Contact sports are defined for the purpose of the regulation.)

(c) Delineating some of the factors which will be considered in assessing whether a recipient has provided equal opportunity in the area of athletics.

(d) Allowing recipients an adjustment period during which they must work to comply with this section as quickly as possible but in no event allowing noncompliance to continue past one year from the effective date of the regulation in the case of elementary schools and in no case later than three years from the effective date of the regulation in the case of secondary and post-secondary schools.

52

A new § 86.42 is added concerning curriculum.

ANALYSIS

53

Several of the changes made in Subpart D are substantive in nature. The language in subparagraph 86.31(b)(7) has been amended in response to comments in order to clarify the Department's position when agencies, organizations or persons not part of the recipient would be subject to the requirements of the regulation. Some of these "outside" organizations have been exempted from title IX with respect to their membership policies by a recent amendment to the Statutes which was enacted in late 1974. This amendment is reflected, as already noted, in § 86.14 which exempts social fraternities and sororities, certain named groups such as the Girl Scouts and certain voluntary youth service organizations. Other groups, however, such as business and professional fraternities and sororities and honor societies continue to be covered. The regulation provides that if the recipient furnishes the "outside" agency or organization with "significant assistance," the "outside" agency or organization becomes so connected with the education program or activity of the recipient that any discriminatory policies or practices for which it is responsible become attributable to the recipient. Thus, such forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

Section 86.31(c) provides that where a sex-restricted scholarship, fellowship, or other such award established by a foreign will, trust or similar legal instrument but administered by a recipient constitutes a benefit to a student *already matriculating* at the recipient institution (*e.g.* the Rhodes Scholarship and the Clare Fellowship which provides opportunities for male students at domestic institutions to study abroad), the scholarship, fellowship or award may not be administered by the recipient unless the recipient administers, provides, or otherwise makes available, reasonable opportunities for similar studies for students of the other sex. Such benefits may be derived from either domestic or foreign sources.

54

The language in subparagraph 86.32(c)(2) has been changed in response to numerous comments which indicated concern that institutions which list or approve off-campus housing would be required to conduct on-site reviews of that housing which would result in a high cost to the institutions and thereby militate against its continuing to aid students in finding off-campus housing. Under the regulation, on-site reviews, while permissible, need not be made as a routine matter by institutions, but the institution must take reasonable steps to assure itself that off-campus housing is comparable with respect to quality, quantity, and cost for members of each sex, given the proportion of individuals of each sex seeking such housing.

55

The changes in § 86.34 are also substantive. Subparagraph 86.34(a) requires physical education classes at the elementary school level to comply fully with the regulation as quickly as possible but to be in full compliance no later than one year from the effective date of the regulation in order to permit schools and local education agencies sufficient time to adjust schedules and prepare staff. It further requires physical education classes at the secondary and post-secondary levels to comply fully with the regulation as quickly as possible but to be in full compliance no later than threee years from the effective date of the regulation. During such grace periods, while the recipient is making any necessary adjustments, it must ensure that physical education classes and activities which are separate are comparable for members of each sex. The recipient must be able to demonstrate that it is moving as expeditiously as possible within the prescribed time frame toward eliminating separate physical education classes. The adjustment period permitted at the secondary and post-secondary levels is significantly longer than that to be permitted at the elementary level because of the existence of wide skill differentials attributable to the traditionally lower levels of training available to girls in many schools.

56

Subparagraph 86.34(b) provides that ability grouping in physical education classes is permissible provided that the composition of the groups is determined objectively with regard to individual performance rather than on the basis of sex. Subparagraph 86.34(c) allows separation of students by sex within physical education classes during competition in wrestling, boxing and other sports the purpose or major activity of which involves bodily contact. Subparagraph 86.34 (d), requiring the use of standards for measuring skill or progress in physical education which do not impact adversely on members of one sex, is intended to eliminate a problem raised by many comments that, where a goal-oriented standard is used to assess skill or progress, women will almost invariably score lower than men. For example, if progress is measured by determining whether an individual can perform twenty-five push-ups, the standard may be virtually out-of-reach for many more women than men because of the difference in strength between average persons of each sex. Accordingly, the appropriate standard might be an individual progress chart based on the number of push-ups which might be expected of that individual.

57

Subparagraph 86.34(e) which allows separate sessions in sex education for boys and girls at the elementary and secondary school level was published on July 12, 1974, as a clarification of the proposed regulation published in June (39 FR 25667). The final language has been slightly modified in response to comments indicating that the original language published on July 12, which referred generally to "sessions involving sex education" was somewhat vague. The present language more precisely identifies the material which may be taught separately as that dealing "exclusively with human sexuality." It should be stressed, of course, that neither the proposed regulation nor these final provisions require schools to offer sex education classes. Rather, the regulation specifically allows particular portions of any such classes that a school district elects to offer to be offered separately to boys and girls.

58

Numerous comments were received on the subject of physical education both in favor of and opposed to the position taken in the proposed regulation. Many commentators linked their opposition to coeducational physical education to their opposition to coeducational sex education classes. Some asked for separate but equal or comparable physical education. Others were opposed to the proposed regulations on the grounds of safety and supervision problems, and because they believed that physical differences between the sexes mandated differential treatement. Another group suggested that women would be discriminated against by losing in competition and receiving lower grades. Finally, some were opposed to any Federal involvement in local school matters.

59

The expanded section on counseling and use of appraisal and counseling materials was included in response to comments. Three amendments to the original language are of particular note: First, while the language which appeared in the proposed regulation treated only use of appraisal and counseling materials, paragraph 86.36(a) of the final regulation prohibits discriminatory counseling itself. Second paragraph 86.36(b) which incorporates some of the proposed language on materials also includes several further concepts. It allows use of different counseling materials also includes several further concepts. It allows use of different counseling materials based on sex if use of such materials is shown to be essential in eliminating sex bias. Recipients are required to use internal procedures for ensuring that their counseling materials are free from sex bias; and finally, where use of a particular test or instrument results in a classification which is substantially disproportionate in sexual composition, the recipient must take whatever action is necessary to assure itself that the disproportionate classification is not the result of a sex-biased test or discriminatory administration of an unbiased test. Third, paragraph 86.36(c) requires that where a recipient educational institution finds that the composition of a class is disproportionately male or female, it must take steps to assure itself that the disproportion is not the result of sex-biased counseling or the use of discriminatory counseling or appraisal materials.

60

New § 86.37 concerning financial assistance to students has also been expanded over its earlier version as § 86.35 of the proposed regulation. The proposed regulation prohibited recipients from giving different types of financial assistance or different amounts of any form of such assistance on the basis of sex. The present provisions remain unchanged with respect to this requirement.

61

Numerous comments were received from colleges and universities claiming that the proposed paragraph 86.35(a) would cause to "dry-up" a substantial portion of funds currently available for student financial assistance made available through wills, trusts and bequests which require that award be made to members of a specified sex. As a result, a new paragraph 86.37(b) has been added which allows recipients to administer or assist in the administration of scholarships, fellowships or other financial assistance program established pursuant to domestic or foreign wills, trusts, or similar legal instruments, which require that awards be made only to members of a specified sex, provided that the overall effect of such administration or assistance is nondiscriminatory. Thus, the regulation now requires institutions to award financial aid on the basis of criteria other than sex. Once those students eligible for financial aid have been identified, the financial aid office may award aid from both sex-restrictive and non-sex-restrictive sources. If there are insufficient sources of financial aid designated for members of a particular sex, the institution would be required to obtain the funds from other sources or to award less assistance from the sex-restrictive sources.

62

For example, if fifty students are selected by a university to receive financial assistance, the students should be ranked in the order in which they are to receive awards. If award is based on need, those most in need are placed at the top of the list; if award is based on academic excellence, those with the higher academic averages are placed at the top of the list. The list should then be given to the financial aid office which may match the students to the scholarships and other aid available, whether sex-restrictive or not. However, if after the first twenty students have been matched with funds, the financial aid office runs out of non-restrictive funds and is left with only funds designated for men, these funds must be awarded without regard to sex and not solely to men unless only men are left on the list. If both men and women remain on the list, the university must locate additional funding for the women or cease to give awards at that point.

The provision included in the proposed regulation exempting sex-restricted scholarships, fellowships, and other financial assistance programs established under foreign wills, trusts or similar legal instruments, has been removed. Where such scholarships, fellowships, and financial aid are administered by the recipient and constitute assistance to a student enabling him or her to *matriculate at the recipient institution*, they may be treated like similar forms of financial assistance established under domestic wills, trusts, and similar legal instruments or by acts of foreign governments, and paragraph 86.37(b) has been modified accordingly.

64

Subparagraph 86.37(c)(1) requires recipients to provide reasonable opportunities for athletic scholarships or grants-in-aid for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

65

Subparagraph 86.37(c)(2) retains the provision of paragraph 86.35(d) of the proposed regulation allowing sex-restrictive athletic scholarships provided as part of sex-restrictive athletic teams to the extent the operation of such teams is consistent with subparagraph 86.37(c)(1) and the athletics section of the regulation (§ 86.41).

66

Section 86.38 requires, as did its predecessor section, that assistance in making outside employment available to students, and that employment of students by a recipient must be undertaken in a nondiscriminatory manner.

67

Section 86.39, in addition to incorporating § 86.36 of the proposed regulation, requires that if full coverage health service is offered by recipients it must include gynecological care. This requirement should not be interpreted as requiring the recipient to employ a specialist physician. Rather, it is the Department's intent to require only that basic services in the gynecological field such as routine examinations, tests and treatment be provided where the recipient has elected to offer full health service coverage. Any limitations on health services offered cannot be based on sex.

68

The content of paragraph 86.40(a) is unchanged from the earlier proposal. The changes in paragraph 86.40(b) summarized above continue to require that pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom be treated like any other temporary disability. In response to many comments, the regulation now provides in subparagraph 86.40(b)(2) that a recipient may require a student who is or has recently been pregnant to obtain a doctor's certificate as to her ability to partciipate in the normal education program or activity so long as such a certificate is required of all students for other physical or emotional conditions. Subparagraph 86.40(b)(3) now allows a recipient to operate a portion of its program or activity separately for pregnant students. However, it prohibits mandatory assignment of students to such classes or schools and the instructional program offered separately must be comparable to that offered to nonpregnant students.

69

Section 86.41, the athletics section of the regulation, has been changed to meet some of the problems raised by the comments. Many comments received during the comment period indicate some confusion as to whether intramural programs are covered by this section. Since the intent is to cover intramurals, the phrase "interscholastic, intercollegiate, club or intramural athletics" has been substituted for the term "athletic programs" appearing the first sentence of paragraph 86.38(a) of the proposed regulation.

70

Paragraph 86.41(a) provides that athletics must be operated without discrimination on the basis of sex. The Department continues to take the position that athletics constitute an integral part of the educational processes of schools and colleges and, as such, are fully subject to the requirements of title IX even in the absence of Federal funds going directly to athletics. Except for certain specific exemptions not directly pertinent to athletics, paragraph 901(a) of title IX is virtually identical to paragraph 601(a) of title VI of the Civil Rights Act of 1964. Since the language of title IX so closely parallels that of title VI, in the absence of specific Congressional indications to the contrary, the Department has basically interpreted title IX consistently with interpretations of title VI in similar areas. Under title VI, the courts have consistently considered athletics sponsored by educational institutions to be an integral part of that institution's education program or activity and, consequently, covered by title VI. See, for example, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971) and *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 891 (5th Cir. 1966), *affirmed en banc*. 380 F.2d 385 (5th Cir. 1967) *cert. denied sub nom. United States* v. *Caddo Parish Board of Education*, 389 U.S. 840 (1967).

71

Similarly, in cases wherein plaintiffs have challenged state and local rules prohibiting competition between men and women in high school athletics as being a violation of the equal protection clause of the Fourteenth Amendment, interscholastic sports have been specifically recognized as part of the education process. *Brenden* v. *Independent School District* 742, 477, F. 2d 1292, 1297–1299 (8th Cir. 1973) ; *Bucha* v. *Illinois High School Association*, 351 F. Supp. 69, 74 (M.D. Ill. 1972) ; cf. *Hass* v. *South Bend Community School Corporations*, 289 N.E. 2d 495, 499 (S. Ct. Ind. 1972) and *Reed* v. *Nebraska School Activities Association*, 341 F. Supp. 258, 262 (D. Neb. 1972).

72

In addition, § 844 of the Education Amendments of 1974 (Pub. 93–380) compels the Department to "[P]repare and publish * * * proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 * * * which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Thus, in light of the case law under title VI and the Fourteenth Amendment, and the Congressional mandate to cover intercollegiate athletics in § 844 of Pub. L. 93–380, the Department believes that coverage of athletics is mandated by title IX and that such coverage must be reflected in the regulation.

73

A substantial number of comments was received by the Department on the various issues raised concerning the athletic provisions of the proposed regulation. Numerous comments were received favoring a proposal submitted by the National Collegiate Athletic Association that the revenues earned by revenue-producing intercollegiate sports be exempted from coverage under this regulation. Other comments were submitted against this proposal.

74

The NCAA proposal was not adopted. There is no basis under the statute for exempting such sports or their revenues from coverage of title IX. An amendment to the Education Amendments of 1974 was introduced by Senator John Tower on the floor of the Senate specifically exempting from title IX revenue from revenue-producing intercollegiate athletics. 120 *Cong. Rec.* S 8488 (daily ed. May 20, 1974). The "Tower Amendment" was deleted by the conference committee and was, in effect, replaced by the so-called "Javits Amendment" which became § 844 of Pub. L. 93–380 mandating that the Department publish proposed title IX regulations which would include "reasonable provisions" covering intercollegiate athletics.

75

In response to the comments, while paragraph 86.41(a) remains substantively the same as its predecessor, the remainder of the athletes section has been changed. Paragraph 86.38(b) of the proposed regulation required an annual determination of student interest by a recipient. This provision was widely misinterpreted as requiring institutions to take an annual poll of the student body and to offer all sports in which a majority of the student body expressed interest and abolish those in which there is no interest. The Department's intent, however, is to require institutions to take the interests of both sexes into account in determining what sports to offer. As long as there is no discrimination against members of either sex, the institution may offer whatever sports it desires. The "determination of student interest" provision has been removed. A new paragraph 86.41(c)(1) requires institutions to select "sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." In so doing, an institution should consider by a reasonable method it deems appropriate, the interests of both sexes.

Paragraph 86.38(c) of the proposed regulation required all recipients sponsoring athletic activities to take certain affirmative efforts with regard to members of the sex for which athletic opportunities have been limited notwithstanding the lack of any finding of discrimination. Since such a requirement could be considered "affirmative action" and was somewhat inconsistent with § 86.3, it has been deleted. However, "affirmative efforts" may still be required pursuant to paragraph 86.3(a) or may be undertaken on a voluntary basis pursuant to paragraph 86.3(b). Paragraph 86.41(b) permits separate teams for members of each sex where selection for the team is based on competitive skill or the activity involved is a contact sport. If, however, a team in a non-contact sport, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. For example, if tennis is offered for men and not for women and a woman wishes to play on the tennis team, if women's sports have previously been limited at the institution in question, that woman may compete for a place on the "men's" team. However, this provision does not alter the responsibility which a recipient has under § 86.41(c) with regard to the provision of equal opportunity. Under § 86.41(c) (i), recipients are required to select "sports and levels of competition which effectively accommodate the interests and abilities of members of both sexes." Thus, an institution would be required to provide separate teams for men and women in situations where the provision of only one team would not "accommodate the interests and abilities of members of both sexes." This provision, of course, applies whether sports are contact or noncontact. As in the section on physical education, a contact sport is defined by using some examples and leaving the status of other sports to be determined on the basis of whether their purpose or major activity involves bodily contact.

76

Paragraph 86.41(c) retains the substance of paragraph 86.38(d) of the proposed regulation but has been expanded to provide more guidance on what factors the Department considers integral to providing equal opportunities in athletics. A list has been provided for the guidance of recipients of items which will be considered by the Office for Civil Rights in evaluating a recipient's interscholastic, intercollegiate, club or intramural athletics to determine if equal opportunity is available. These items will be considered whether or not a recipient sponsors separate teams, since inequality of opportunity may exist even where women participate on the same teams with men. The enumeration of items is not intended as a limitation on the items which the Department may deem pertinent for consideration during a particular compliance investigation or review.

77

As provided in the proposed regulation, the Department will not consider, as a *per se* failure to provide equal opportunity, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if such separate teams are offered or sponsored. Clearly, it is possible for equality of opportunity to be provided without exact equality of expenditure. However, any failure to provide necessary funds for women's teams may be considered by the Department in assessing equality of opportunity for members of each sex.

78

Finally, paragraph 86.41(d) has been added to provide a period of time similar to that allowed in the area of physical education for recipients to adjust their athletics offerings to comply with the requirements of the regulation. The Department will construe this section as requiring recipients to comply before the end of the adjustment period wherever possible.

79

The last substantive change in Subpart D is the addition of specific exemption of textbooks and curricular materials from the scope of the regulation. The new section explicitly states the Department's position that title IX does not reach the use of textbooks and curricular materials on the basis of their portrayals of individuals in a stereotypic manner or on the basis that they otherwise project discrimination against persons on account of their sex. As stated in the preamble to the proposed regulation, the Department recognizes that sex stereotyping in textbooks and curricular materials is a serious matter. However, the imposition of restrictions in this area would inevitably limit communication and would thrust the Department into the role of Federal censor. There is no evidence in the legislative history that the proscription in title IX against sex discrimination should be interpreted as requiring, prohibiting or limiting the use of any such material. Normal rules of statutory construction require the Department, wherever possible, to interpret statutory language in such a way as to avoid potential conflicts with the Constitution. Accordingly, the Department has construed title IX as not reaching textbooks and curricular materials on the ground that to follow another interpretation might place the Department in a position of limiting free expression in violation of the First Amendment.

80

The Department received a number of comments as well as one petition concerning discrimination in textbooks and curricular materials. The comments in favor of including coverage of textbooks and curricular materials came from national organizations, several college or university presidents or chancellors, several local school superintendents, several local organizations and interest groups, and a number of individuals. Comments opposing coverage were also submitted.

SUBPART E—CHANGES

81

Sections 86.41 through 86.51 are redesignated as §§ 86.51 through 86.61. Subparagraph 86.51(a) (4) is added providing as follows:

A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such a preference has the effect of discriminating on the basis of sex in violation of this Part.

82

Subparagraph 86.51(b) (2) is amended to add after the word "termination" the words "application of nepotism polices." Subparagraph 86.51(b) (6) is amended to delete the words "pregnancy leave" and to substitute therefor the words "leave for pregnancy, childbirth, false pregnancy, termination of pregnancy."

83

Section 86.53 is amended by deleting § 86.53(a) and substituting the following:

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

84

Section 86.54 is amended by deleting paragraphs 86.44 (b) and (c) as they appeared in the proposed regulation and by substituting a new paragraph 86.54 (b) to read:

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

85

Paragraph 86.55(c) is amended by deleting the words "operate to." Section 86.57 is amended by deleting paragraphs 86.57 (b), (c), (d) and (e) and by substituting therefor language:

(1) Prohibiting discrimination in employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(2) Requiring treatment of pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom, to be treated as any other temporary disability for the purposes of leave, seniority and other benefits or services.

(3) Requiring, where a recipient does not maintain a leave policy or where an employee does not qualify for leave under such a policy because of inadequate longevity on the job, that the recipient shall treat an employee's pregnancy,

childbirth, false pregnancy, termination of pregnancy, and recovery therefrom, as a justification for reasonable leave without pay with guaranteed reinstatement upon her return.

86

Section 86.60 is amended by deleting the term "Ms."

ANALYSIS

87

Before discussing the substantive changes in Subpart E, one explanation is needed regarding a section that was not changed. Subpart E generally follows the Sex Discrimination Guidelines (29 CFR Part 1604) of the Equal Employment Opportunity Commission (EEOC) and the regulations of the Office of Federal Contract Compliance (OFCC), United States Department of Labor (41 CFR Part 60). The EEOC administers title VII of the Civil Rights Act of 1964, which prohibits employment discrimination, and the OFCC is responsible for the coordination and implementation of Executive Order 11246, as amended, which prohibits employment discrimination by Federal contractors. HEW is responsible for administration, pursuant to the OFCC regulations, of the Executive Order as to Federal contractors who are educational institutions. Virtually all recipients subject to this Part 86 are also subject to title VII and many are also subject to the Executive Order. Except in the area of fringe benefits, where Subpart E of the title IX regulation differs from the title VII Sex Discrimination Guidelines of the EEOC, an employer who complies with the title IX regulation will generally be complying both with title VII and the Executive Order. It shoud be emphasized, however, that nothing in the title IX regulation alters any responsibilities that an employer may have under the Executive Order or title VII. Paragraphs 86.3(a) of Subpart A have been modified to accentuate this point.

88

Accordingly, subparagraphs 86.56(b)(2) of Subpart E remains the same as subparagraph 86.46(b)(2) as it appeard in the proposed regulation and continues to follow the Executive Order regulations in requiring that fringe benefit plans provide either for equal periodic benefits to members of each sex or equal contributions by the employer for members of each sex (§ 86.39 imposes identical requirements for student benefit plans). The title VII Sex Discrimination Guidelines of the EEOC differ in that they prohibit payment of unequal periodic benefits on the basis of sex and preclude employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females. While the approach taken in the final regulation is felt to be the most reasonable at present, the Secretary recognizes the need to move toward some provision for equality in periodic benefits. In view of the potential problems associated with such a provision and also with the present inconsistency between the EEOC, OFCC and HEW approaches, the President has directed that a report be prepared by October 15 recommending a single approach.

89

Subparagraph 86.51(a)(1) makes it clear that the regulation applies to part-time employees. In the preamble to the proposed regulation it was stated that the section concerning fringe benefits (now §86.56) would be interpreted as follows: It would require that where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full time employees, the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. Assuming the absence of discriminatory hiring practices on the part of an employer which channel female job applicants into part-time positions, it is questionable whether the Department has the authority to place the burden on an employer to demonstrate that failure to give part-time employees fringe benefits proportionate to those provided to full-time employees under the circumstances stated above is not discriminatory. Since discriminatory hiring practices which channel female job applicants into part-time jobs are clearly prohibited by subparagraph 86.51(a)(1), and because of the questions which may be raised as to the soundness of the interpretation given to § 86.56 in the preamble to the proposed regulation, the Department will assume the initial burden of demonstrating that a particular method of providing fringe benefits to part-time employees is discriminatory.

90

Subparagraph 86.51(a)(4) parallels paragraph 86.23(b) which concerns student recruitment. It prohibits recipients from granting preferences to employment applicants who are graduates of particular institutions, the student bodies of which are exclusively or predominantly of one sex, if the effect of such preferences results in discrimination on the basis of sex.

91

Paragraph 86.43(a) as it appeared in the proposed regulation required recipients who recruit for employment to make comparable efforts to recruit members of each sex. Paragraph 86.53(a) of the final regulation no longer requires comparable efforts but provides that a recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. This change recognizes that, under some circumstances, an employer may expend greater efforts to recruit members of one sex without discriminating against members of the other. For example, where a school district is located close to an all-female private undergraduate school, the district may have to expend greater efforts to recruit male teachers than it will have to use to recruit female teachers. However, where a recipient is presently discriminating on the basis of sex, or has in the past so discriminated, it shall take remedial action to recruit members of the sex discriminated against until the effect of such past discrimination no longer exists.

92

In response to the public comments, the language of paragraph 86.54(b) has been simplified over the language appearing in the proposed regulation to prohibit a recipient from enforcing any policy or practice which results in the payment of wages to members of one sex at a rate less than that paid to members of the other sex for equal work on jobs, the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. This makes the title IX regulation consistent with the wording of the Equal Pay Act of 1963, Pub. L. 88–38, 29 U.S.C. paragraph 206(d), and will enable the Director to rely on the case law established under the Equal Pay Act to interpret and enforce paragraph 86.54(b).

93

Paragraphs 86.57 (b), (c) and (d) have been slightly modified from the earlier version to make it clear that a recipient cannot discriminate on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom and that such conditions and any temporary disabilities resulting therefrom must be treated by the recipient as any other temporary disability for all job-related purposes.

94

Paragraph 86.47(e) in the proposed regulation provided that an employee could not be required to commence leave related to pregnancy so long as her physician certified that she was capable of performing her duties, and that she must be allowed to resume work after such a leave no more than two weeks after her physician certifies that she is capable of doing so or, in the case of an employee who is a teacher, at the beginning of the first academic term after such certification is made. This section has been completely deleted from the final regulation since it is inconsistent with paragraph 86.57(b) which requires that all conditions related to pregnancy be treated as disabilities for job-related purposes. If a recipient requires that any employees suffering from a temporary disability be required to obtain a physician's certification that they are capable of continued work, then it may also require such a certification from pregnant employees. If a recipient requires all employees who take sick leave for a temporary disability to return to work after such leave two weeks after a physician certifies that such employees are capable of returning, then the same procedure must be utilized for pregnant employees. However, if none of these certifications is required for other temporary disabilities, none may be required of pregnant employees. Likewise, a recipient may not require pregnant employees to give advance notice of which they intend to commence sick leave unless such advance notice is also required of all other employees who intend to go on sick leave due to a temporary disability in cases where advance knowledge of the absence makes such notice possible.

95

Paragraph 86.60(a) prohibits pre-employment inquiries as to an applicant's marital status since such inquiries are frequently the foundation for discrimination against married women. Subparagraph 86.21(c)(4) in Subpart C contains a similar prohibition with regard to preadmission inquiries. The proposed regulation proscribed inquiries into whether a job applicant was "Ms., Miss or Mrs." Since under paragraph 86.60(b) inquiries as to the sex of an applicant may be made so long as it is made of members of both sexes and is not used to discriminate, the inquiry proscribed in paragraph 86.60(a) as to whether an applicant is "Ms., Miss or Mrs." has been changed to delete the "Ms."

96

Finally, § 86.51 permits consideration of sex in making employment decisions where sex is a "bona fide occupational qualification." This section is retained in the final regulation to make the title IX regulation consistent with the Sex Discrimination Guidelines of the EEOC and with the OFCC regulations implementing Executive Order 11246. This section will be interpreted narrowly, consistent with interpretations already made under title VII of the Civil Rights Act of 1964 and the Executive Order.

SUBPART F

§ 86.71 *Interim Procedures*

For the purposes of implementing this Part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-6—80-11 and 45 CFR Part 81.

The Secretary has chosen to adopt the title VI procedures for use during the interim period between the effective date of this regulation and effectiveness of the final consolidated procedural regulation to simplify enforcement during that time and to avoid applying a different procedure for enforcement of requirements concerning discrimination based on race, color, or national origin from those based on sex. The Department is publishing, simultaneously with this final regulation, a proposed consolidated procedural regulation which will apply to most of the Department's civil rights enforcement activities. Comments on that proposal are solicited, as provided in the notice of proposed rulemaking, for 45 days.

QUESTIONS

Questions concerning the application or interpretation of this regulation should be addressed to the Regional Directors of the Office for Civil Rights whose addresses are as follows:

Region I—Mr. John G. Bynoe, RKO General Building, 5th Floor, Bulfinch Place, Boston, Massachusetts 02114.

Region II—Mr. Joel Barkan, 26 Federal Plaza, Room 3908, New York 10007.

Region III—Mr. Dewey Dodds, Gateway Building, 3535 Market Street, Philadelphia, Pennsylvania 19101.

Region IV—Mr. William Thomas, 50 Seventh Street, N.E., Room 404, Atlanta, Georgia 30323.

Region V—Mr. Kenneth A. Mines, 309 W. Jackson Boulevard, 10th Floor, Chicago, Illinois 60606.

Region VI—Ms. Dorothy D. Stuck, 1114 Commerce Street, Dallas, Texas 75202.

Region VII—Mr. Taylor D. August, 12 Grand Building, 12th and Grand Avenue, Kansas City, Missouri 64106.

Region VIII—Mr. Gilbert D. Roman, Room 11037 Federal Building, 1961 Stout Street, Denver, Colorado 80202.

Region IX—Mr. Floyd L. Pierce, 760 Market Street, Room 700, San Francisco, California 94102.

Region X—Ms. Marlaina Kiner, 6101 Arcade Plaza Building, 1321 Second Avenue, Seattle, Washington 98101.

Dated: May 27, 1975.

CASPAR W. WEINBERGER,
Secretary.

Dated: May 27, 1975.
Approved:
GERALD R. FORD,
President.

Part 86 is added to read as set forth below:

PART 86—NONDISCRIMINATION ON THE BASIS OF SEX UNDER FEDERALLY ASSISTED EDUCATION PROGRAMS AND ACTIVITIES

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86.1 Purpose and effective date.
86.2 Definitions.
86.3 Remedial and affirmative action and self-evaluation.
86.4 Assurance required.
86.5 Transfers of property.
86.6 Effect of other requirements.
86.7 Effect of employment opportunities.
86.8 Designation of responsible employee and adoption of grievance procedures.
86.9 Dissemination of policy.

SUBPART B—COVERAGE

86.11 Application.
86.12 Educational institutions controlled by religious organizations.
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86.17 Transition plans.
86.18–86.20 [Reserved].

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SUBPART D—DISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

Sec.
86.31 Education programs and activities.
86.32 Housing.
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86.34 Access to course offerings.
86.35 Access to schools operated by L.E.A.s.
86.36 Counseling and use of appraisal and counseling materials.
86.37 Financial assistance.
86.38 Employment assistance to students.
86.39 Health and insurance benefits and services.
86.40 Marital or parental status.
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86.42 Textbooks and curricular material.
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SUBPART E—DISCRIMINATION ON THE BASIS OF SEX IN EMPLOYMENT IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

86.51 Employment.
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86.61 Sex as bona-fide occupational qualification.
86.62–86.70 [Reserved].

SUBPART F—PROCEDURES

86.71 Interim procedures.

SUBPART A—INTRODUCTION

§ *86.1 Purpose and effective date.*

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub. L. 93–568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub. L. 93–380)

§ *86.2 Definitions.*

As used in this part, the term—

(a) *"Title IX"* means title IX of the Education Amendments of 1972, Pub. L. 92–318, as amended by section 3 of Pub. L. 93–568, 88 Stat. 1855, except § 904 and 906 thereof; 20 U.S.C. §§ 1681, 1682, 1683, 1685, 1686.

(b) *"Department"* means the Department of Health, Education, and Welfare.

(c) *"Secretary"* means the Secretary of Health, Education, and Welfare.

(d) *"Director"* means the Director of the Office for Civil Rights of the Department.

(e) *"Reviewing Authority"* means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this Part.

(f) *"Administrative law judge"* means a person appointed by the reviewing authority to preside over a hearing held under this Part.

(g) *"Federal financial assistance"* means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) "*Recipient*" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) "*Applicant*" means one who submits an application, request, or plan required to be approved by a Department official, or by a recipient, as a condition to becoming a recipient.

(j) "*Educational institution*" means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) "*Institution of graduate higher education*" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "*Institution of undergraduate higher education*" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "*Institution of professional education*" means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the United States Commissioner of Education.

(n) "*Institution of vocational education*" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) "*Administratively separate unit*" means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "*Admission*" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "*Student*" means a person who has gained admission.

(r) "*Transition plan*" means a plan subject to the approval of the United States Commissioner of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682.)

§ 86.3 *Remedial and affirmative action and self-evaluation.*

(a) *Remedial action.* If the Director finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Director deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action.* In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Nothing herein shall be interpreted to alter any affirmative action obligations which a recipient may have under Executive Order 11246.

(c) *Self-evaluation.* Each recipient education institution shall, within one year of the effective date of this part:

(i) Evaluate, in terms of the requirements of this part, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and non-academic personnel working in connection with the recipient's education program or activity;

(ii) Modify any of these policies and practices which do not or may not meet the requirements of this part; and

(iii) Take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials.* Recipients shall maintain on file for at least three years following competition of the evaluation required under paragraph (c) of this section, and shall provide to the Director upon request, a description of any modifications made pursuant to subparagraph (c)(ii) and of any remedial steps taken pursuant to subparagraph (c)(iii).

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682.)

§ 86.4 *Assurance required.*

(a) *General.* Every application for Federal financial assistance for any education program or activity shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Director, that each education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Director if the assurance applies fail to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Director of such assurance.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structure are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* The Director will specify the form of the assurances required by paragraph (a) of this section and the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682.)

§ 86.5 *Transfers of property.*

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee which operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of Subpart B.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682.)

§ 86.6 *Effect of other requirements.*

(a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 799A and 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

(Secs. 901, 902, 905, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1685.)

(b) *Effect of State or local law or other requirements.* The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement which would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with this part is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682.)

§ 86.7 *Effect of employment opportunities.*

The obligation to comply with this Part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.8 *Designation of responsible employee and adoption of grievance procedures.*

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.9 *Discrimination of policy.*

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organisations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities which it operates, and that is required by title IX and this part not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the Director finds necessary to apprise such persons of the protections against discrimination assured them by title IX and this part, but shall state at least that the requirement not to discriminate in education programs and activities extends to employment therein, and to admission thereto unless Subpart C does not apply to the recipient, and that inquiries concerning the application of title IX and this part to such recipient may be referred to the employee designated pursuant to § 86.8, or to the Director.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of the effective date of this part or of the date this part first applies to such recipient, whichever comes later, which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and (iii) memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement.

bulletin, catalog, or application form which it makes available to any person of a type described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in this paragraph which suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by this part.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and require such representatives to adhere to such policy.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C.

SUBPART B—COVERAGE

§ 86.11 *Application.*

Except as provided in this subpart, this Part 86 applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.

§ 86.12 *Educational institutions controlled by religious organizations.*

(a) *Application.* This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

(b) *Exemption.* An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.13 *Military and merchant marine educational institutions.*

This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.14 *Membership practices of certain organizations.*

(a) *Social fraternities and sororities.* This part does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts and Camp Fire Girls.* This part does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts and Camp Fire Girls.

(c) *Voluntary youth service organizations.* This part does not apply to the membership practices of voluntary youth service organizations which are exempt from taxation under Section 501(a) of the Internal Revenue Code of 1954 and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 3(a) of P.L. 93-568, 88 Stat. 1682, amending Sec. 901)

§ 86.15 *Admissions.*

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by this part.

(b) *Administratively separate units.* For the purposes only of this section, §§ 86.15 and 86.16, and Subpart C, each administratively separate unit shall be deemed to be an educational institution..

(c) *Application of Subpart C.* Except as provided in paragraphs (c) and (d) of this section, Subpart C applies to each recipient. A recipient to which Subpart

C applies shall not discriminate on the basis of sex in admission or recruitment in violation of that subpart.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, Subpart C applies only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public insttiutions of undergraduate higher education.* Subpart C does not apply to any public institution of undergraduate higher education which traditionally and continually from its establishment has had a policy of admitting only students of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.16 *Educational institutions eligible to submit transition plans.*

(a) *Application.* This section applies to each educational institution to which Subpart C applies which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but thereafter admitted as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of Subpart C unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 86.17, which plan provides for the elimination of such discrimination by the earliest practicable date but in no event later than June 23, 1979.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.17 *Transition plans.*

(a) *Submission of plans.* An institution to which § 86.15 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes, as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 86.16 applies shall result in treatment of applicants to or students of such recipient in violation of Subpart C unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 86.16 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.18–86.20* [*Reserved*]

SUBPART C—DISCRIMINATION ON THE BASIS OF SEX IN ADMISSION AND RECRUITMENT PROHIBITED

§ *86.21 Admission.*

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§ 86.16 and 86.17.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this Subpart applies shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes:

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.22 Preference in admission.*

A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; U.S.C. 1681, 1682)

§ *86.23 Recruitment.*

(a) *Nondiscriminatory recruitment.* A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b).

(b) *Recruitment at certain institutions.* A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ *86.24–86.30* [*Reserved*]

SUBPART D—DISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

§ *86.31 Education programs and activities.*

(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Discriminate against any person in the application of any rules of appearance;

(6) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(7) Aid or perpetuate discrimination against any person by providing significant assstance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships; or other awards established by foerign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided,* a recipient educational institution which administers or assists in the administration of such scholarships, fellowship, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Programs not operated by recipient.* (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.32 *Housing.*

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

§ 86.33 *Comparable facilities.*

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

§ 86.34 *Access to course offerings.*

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the required shall comply fully with this section as expeditiousy as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.35 *Access to schools operated by L.E.A.s.*

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Sections 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.36 *Counseling and use of appraisal and counseling materials.*

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising of counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

§ 86.37 *Financial assistance.*

(a) *General.* Except as provided in paragraphs (b), (c) and (d) of this section, in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) a recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in subparagraph (b)(1) of this paragraph, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under subparagraph (b)(2)(i) of this paragraph; and

(iii) No student is denied the award for which he or she was selected under subparagraph (b)(2)(i) of this paragraph because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of sutdents of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41 of this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ *86.38 Employment assistance to students.*

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall not do so in a manner which violates Subpart E.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.39 Health and insurance benefits and services.*

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.40 Marital or parental status.*

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.41 Athletics.*

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by recipient, and no recipieint shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
(ii) The provision of equipment and supplies;
(iii) Scheduling of games and practice time;
(iv) Travel and per diem allowance;
(v) Opportunity to receive coaching and academic tutoring;
(vi) Assignment and compensation of coaches and tutors;
(vii) Provision of locker rooms, practice and competitive facilities;
(viii) Provision of medical and training facilities and services;
(ix) Provision of housing and dining facilities and services;
(x) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484)

§ *86.42 Textbooks and curricular material.*

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.43–86.50 [Reserved]*

SUBPART E—DISCRIMINATION ON THE BASIS OF SEX IN EMPLOYMENT IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

§ *86.51 Employment.*

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this Subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) *Application.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.52 Employment criteria.*

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.53 Recruitment.*

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ *86.54 Compensation.*

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females.

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 86.51.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.56 Fringe benefits.

(a) *"Fringe benefits" defined.* For purposes of this part, "fringe benefits" means: any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 86.54.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.57 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.58 *Effect of State or local law or other requirements.*

(a) *Prohibitory requirements.* The obligation to comply with this subpart is not obviated or alleviated by the existence of any State or local law or other requirement which imposes prohibitions or limits upon employment of members of one sex which are not imposed upon members of the other sex.

(b) *Benefits.* A recipient which provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.59 *Advertising.*

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a *bona-fide* occupational qualification for the particular job in question.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.60 *Pre-employment inquiries.*

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is "Miss or Mrs."

(b) *Sex.* A recipient may make preemployment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 86.61 *Sex as a bona-fide occupational qualification.*

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§§ 86.62–86.70 [*Reserved*]

SUBPART F—PROCEDURES [INTERIM]

§ 86.71 *Interim procedures.*

For the purposes of implementing this part during the period between its effective date and the final issuance by the Department of a consolidated procedural regulation applicable to title IX and other civil rights authorities administered by the Department, the procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference. These procedures may be found at 45 CFR §§ 80-6—80-11 and 45 CFR Part 81.

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Mr. O'HARA. Our first witnesses will be appearing as individuals and spokesmen for the American Football Coaches Association; they are not speaking as representatives of their institutions in their statements but as representatives of the association and themselves as individuals.

The spokesman for the group will be Mr. Darrell Royal, who is president of the American Football Coaches Association and who is the football coach at the University of Texas.

Mr. Royal, if you will introduce those who accompany you, you may proceed.

STATEMENT OF DARRELL ROYAL, PRESIDENT, AMERICAN FOOTBALL COACHES ASSOCIATION, ACCOMPANIED BY BOB BLACKMAN, UNIVERSITY OF ILLINOIS; JERRY CLAIBORNE, UNIVERSITY OF MARYLAND; FRANK KUSH, ARIZONA STATE; TOM OSBORNE, UNIVERSITY OF NEBRASKA; BO SCHEMBECHLER, UNIVERSITY OF MICHIGAN; MIKE WHITE, UNIVERSITY OF CALIFORNIA AT BERKELEY; JOE YUKICA, BOSTON COLLEGE; AND CLIFF HAGEN, UNIVERSITY OF KENTUCKY

Mr. Royal. Mr. Chairman, I would like to introduce my fellow coaches. As you state, we are here as members of the American Football Coaches Association and not representing our various institutions. However, I will identify these men from the schools which they coach.

On the far left is Jerry Claiborne from the University of Maryland; Bo Schembechler of the University of Michigan; Frank Kush from Arizona State; Tom Osborne from the University of Nebraska; Bob Blackman, University of Illinois; Joe Yukica from Boston College; and Mike White from the University of California at Berkeley.

We do appreciate the audience and we are going to try to make it brief and just hit on a couple of points.

First let me say that I do not have a law background, so it is hard for me to determine what is legal and what isn't. But it is difficult for us in the intercollegiate athletics business to understand why the Federal Government would be directing the spending of our moneys when intercollegiate athletics is receiving no Federal support for our programs.

As we read the guidelines of the HEW, we first read that we will not be requested to match necessarily dollar for dollar the money that is being spent on men's intercollegiate athletics with a like sum for the women's programs. However, as we read on, we see the guidelines that are laid out for us in the form of equal salaries and coaches, equal housing, equal training table facilities, equal equipment, equal everything. The sum total still comes out that we will be spending the same amount of money on the women's program that we are presently spending on the men's programs.

Let me say that some of the men's programs are being eliminated and dropped from our college campuses today simply because they are not self-supporting. The universities, the colleges, throughout the country cannot come up with the added resources to keep the athletic programs going when they continually go in the hole. So throughout the country programs are already being dropped.

Now we move the next step to the situation where we have men's programs that are generating revenue, that are making money, and now if that institution is saddled with the same responsibility to match dollars, the end result very well could be that they can't do it and they would say that we have to give up all athletic programs because they have no source to go to for this money.

Another situation is that the administration, the board of regents, the college presidents and chancellors might come to us and, say, "take half the money that is generated from the men's sports and apply that to the women's sports." We feel that our programs would be so weakened that we no longer could generate money through ticket sales because we have long ago recognized that the public will not pay nor will the news media support an inferior program. They are going to have to have an attractive program before they will publicize our sport or before ticket sales will be made.

So eventually I can see a dying process for all athletics, both men's and women's.

Now, the situation could be solved possibly this way: You take the two revenue-bearing sports, football and basketball, and keep them in their present form and this would be just about the picture at the University of Texas. I think we could do that and take the profit from those two sports and give that to women's intercollegiate athletics, but then we would have to drop the programs of track, baseball, golf, and tennis for the men.

We could have only football and basketball, and then the profits from that, to spend an equal amount, would have to go to women's intercollegiate athletics.

This would not last long, because I don't see that we can generate more income than we are presently generating and we have spiraling costs that are going up for all those programs, and this is especially true in football and basketball, and that situation couldn't last long.

Any way we look at it, we can't see that it is going to do anything other than eliminate, kill, or seriously weaken the programs that we already have in existence.

One way that it might be done would be to protect the revenue-bearing sports and take the profits from those revenue-bearing sports and then split that equally between the men's and women's programs.

We would like to hope that Congress did not show the full impact, economic impact, when this was brought before them; and, as you stated in your opening statement, if they weren't getting what they actually intended that they get, we must believe that they have not known how our programs are financed and they have not thought in detail as to what effect this would have on the present existing programs that are self supporting.

We do not receive Federal money nor do we receive State moneys. We support our programs through ticket sales and through the interest that is generated in the public and their financial support of our programs.

Because of the serious economic impact, we request that a moratorium be placed until a very serious, aggressive economic study can be made of what is going to happen to intercollegiate athletics if the present guidelines go through.

That is it, Mr. Chairman. We do appreciate your time, your interest and your attentiveness. I guess we will be open for any questions that you might want to direct to us.

[Proposed statement of policy by the witnesses follows:]

Proposed Statement of Policy

The undersigned head football coaches, in a special meeting June 17, 1975, approved the following statement of policy regarding the announced HEW regulations implementing Title IX and will recommend that the Board of Trustees of the American Football Coaches Association at its meeting June 21, 1975 in Lubbock, Texas, officially urge all AFCA members to support this position:

1. The regulations go far beyond the intent of Congress and place intercollegiate athletics under the control of the Federal Government. The regulations will control the use of donated funds, use of generated income, the kind of program to be conducted and the allocation and qualifications for scholarship assistance. This is not desirable for the future growth of either men's or women's athletics.
2. Income generated by football is a principal source of athletic income at many colleges and frequently finances the entire athletic program as well as the construction, maintenance and debt retirement of facilities. In many instances it has provided the funds for the present expansion of women's athletics. This will no longer be possible under the HEW regulations.
3. College football, developed over more than 100 years, has been more responsible than any other factor for the present wide public acceptance and support of college athletics and there has been no valid study undertaken by HEW, the Congress or any other government agency as to the destructive economic impact these regulations will have upon football as well as the financial structure of intercollegiate athletics for both men and women.
4. The Federal Government does *not* provide any financial assistance, insofar as we know, to intercollegiate athletics, but these Federal regulations mandate vast new expenditures while seriously damaging for the future the ability of men's sports to generate income. Therefore, we urge that Congress suspend these regulations and adopt legislation which would declare a moratorium on the application of HEW's rules to intercollegiate athletics during which HEW would be directed to study and report to Congress regarding (a) the need for such rules in light of the voluntary action being taken by colleges and (b) the economic impact of the rules on all facets of intercollegiate athletics and, in turn, the financial structure of the respective colleges and universities.

Darrell Royal, University of Texas, President, AFCA; Bob Blackman, University of Illinois, Past President, AFCA; Joe Yukica, Boston College; Jerry Claiborne, University of Maryland; Frank Broyles, University of Arkansas; Frank Kush, Arizona State University; Mike White, University of California, Berkeley; Tom Osborne, University of Nebraska; Bo Schembechler, University of Michigan.

Mr. O'Hara. Thank you, Mr. Royal.

Mr. Mottl. Mr. Chairman, I would just like to compliment Mr. Royal on his statement. I attended the University of Notre Dame on a scholarship for baseball. They gave two baseball scholarships a year. Thank God for football and basketball; they financed us who were in minor sports. I never could have secured my education if it had not been for the athletic scholarship.

I certainly applaud Mr. Royal and the other distinguished members of the American Football Coaches Association for being here. I certainly agree with him. I would like to cosponsor a resolution.

As you know, the bureaucrats in HEW are all wet on this proposal. I think a moratorium should be invoked until there can be further study. We want to be fair naturally to women in our collegiate institutions but I think this is not the way to go about it.

I certainly would concur with Mr. Royal's statement and would like to join my other colleagues on this committee if they see fit to introduce a resolution and at least have a moratorium and not have the HEW rules go into effect.

Mr. O'Hara. Let me try to sort of outline the issue if I could with you, Mr. Royal, and then I will turn the questions over to members of the committee.

In the first place, I gather that the Coaches Association questions whether or not intercollegiate athletics are subject to the prohibitions of the law which reads in pertinent part: "No person on the basis of sex shall be excluded from participation or be denied the benefit of or be subjected to discrimination under"—and here is the key language: "any education program or activity receiving Federal financial assistance."

You make the point that you don't believe that the intercollegiate athletic programs of an institution of higher education could be considered an education program or activity receiving Federal financial assistance?

Mr. Royal. Yes, sir.

Mr. O'Hara. In other words, under your interpretation, then, one would have to look at the particular activity of the institution to determine whether or not it was subject to the provisions of title IX and it is your belief that in the case of your activity it is not subject to the provisions of title IX?

Mr. Royal. That is correct. We do not receive Federal funds to support our athletic programs.

Mr. O'Hara. Now, it seems to me that the second objection which you have expressed goes to the type of regulation that is proposed. You have suggested that you think the regulations are inappropriate to the goal. That is, equality of treatment does not necessarily involve the kinds of regulations that are found in regulation 86.41, which talks about trying out for the same teams or having separate teams or the so-called equal opportunity idea which provides for equality in the provision of equipment and supplies, quality in scheduling of games, practice time, travel, and per diem allowance, so forth and so on.

In other words, you believe that equal treatment would not necessarily involve all of the things that are prescribed in the regulations; is that your view?

Mr. Royal. I don't know if I understand exactly what you are asking me, Mr. Chairman.

Mr. O'Hara. In other words, you don't think there would be discrimination against women if you did not have the same sort of travel arrangements for women's teams as you do for men's teams nor would it be discrimination if you didn't have exactly equal scheduling?

Mr. Royal. I think I know what you are asking me now. The point I made was not contradicting what you said but the point I made was that this is not going to help women's intercollegiate athletics because the effect is going to be that it is going to kill the intercollegiate athletics programs for women as we presently see it and women will not get money from that source eventually anyway. Thereby women's intercollegiate athletics will not be helped.

I am not personally opposed to women's intercollegiate athletics. So help me, I am not. I think they have the same things to be gained from their programs as men do. The only question is how the money is going to be supplied and what source it is going to come from.

If we have to divide our sources, we are going to be so drained and so weakened that we are going to not be able to continue to generate income, and thereby women will be affected also.

Mr. O'HARA. Now let me just conclude with his observation: The courses open to the committee are essentially three. One, the committee could find that the regulations, including the regulations with respect to intercollegiate athletics, are an appropriate exercise of the rulemaking power by the Office of Education, Department of Health, Education, and Welfare, and let it go at that. Or we could find that the regulations as issued are not in keeping with the limits of the law and the intent of the law and bring forward a resolution of disapproval. Or we might find that the regulations, while appropriate to the law, are nevertheless unwise and we might wish to amend the law.

Those are the three courses that I think are open to us. I wanted you to know what the range of possibilities was before this committee.

Mr. ROYAL. Yes, sir. Mr. Chairman, I would want to say this; that our purpose in being here is simply to point out to you the way our programs are presently financed and the impact that this might have if the guidelines are enacted as we read them.

Of course, it is up to you gentlemen and ladies to make the decision as to what you are going to do with it. We are simply here to present our side of the thing and point out the way the programs are financed.

Mr. O'HARA. I appreciate your coming before us. I think it has been very useful to us. The Chair now recognizes the gentlewoman from New York, Mrs. Chisholm.

Mrs. CHISHOLM. Thank you very much.

Under title VI the prohibition against racial discrimination has been interpreted as barring discrimination in all aspects of the educational process. Now, since the language of title VI and title IX are so similar, don't you think that the title IX bar against sex discrimination under section 901 must be interpreted in the same way?

I repeat title VI, bars racial discrimination in any program, any kind of educational program that receives Federal aid directly or indirectly. Since the language of title VI and title IX is so similar, what would be your reaction?

Mr. ROYAL. Other than what I have stated, I am not well enough versed or informed on the full guidelines of HEW. I don't even attempt to say that I have studied it as thoroughly as you people. I just want to present one or two points here for the input and your decision-making. As I said, I am not a lawyer and I could not get into the legal aspects of this thing and discuss it intelligently. I don't feel qualified to do that.

Mr. OSBORNE. I believe the key thing is Federal aid again. Title VI, as you read it, did indicate equality or no discrimination where Federal aid was involved. Again, we have said several times here we do not know of any cases where Federal aid is involved in the maintenance of intercollegiate athletic programs.

I believe the purpose of title IX is to take back money if programs are not run in accordance with HEW guidelines. It seems irresponsible to take back money that has never been given in the first place. That is our point. If there is no Federal money being given to us, then why should we be regulated by HEW? That is the distinction I would make.

Again, Darrell and the rest of us are not totally conversant with all the ramifications of all of these titles that we are talking about.

Mrs. CHISHOLM. Of course, we do recognize that, in terms of trying to make any kind of changes, legally or otherwise, tradition is always hard to break. We recognize that. And when it comes to receipt of funds from the Federal Government, tradition is very hard to break. That is what concerns many persons in the Nation today.

Do you regard athletics as a noneducational part of a curriculum? What is your feeling about that?

Mr. OSBORNE. I feel it is very eudcational but I do not feel it is federally funded. That would be the only distinction. I would say this: that I believe that proportionally the minority groups have benefited probably more from athletic grants as we know them now than most any other group. If the programs that we have existing now are seriously impaired—which we know they would be—there simply would not be the money.

Mrs. CHISHOLM. I have just one more question. I think that you are indicating the athletic activities are not federally funded. I must presume therefore that if you have any desire to continue to practice discrimination on the basis of race, sex, or age, that you believe that so long as you don't have any Federal funds, you have a right to continue discriminatory practices.

Mr. OSBORNE. I think so, and the athletic departments generate the funds. We feel that these things will grow naturally. Intercollegiate football has been in existence for a number of years. There is a lot of tradition that has grown up around this.

To have equal women's athletic programs emerge full blown without possibly a demand for them seems a little irresponsible. As Darrell has said—and every man here would agree—nobody sees more value in competitive athletics than we do. We are 100 percent for women's athletics. The point is that we don't see where the money is going to come from. If Government wants to give the money for the women's equal program, that is fine with us. We don't see how that can be done without wrecking what is now in existence.

Mrs. CHISHOLM. Your group is not in a financial position to provide women athletics on the same level as you have done for men students?

Mr. OSBORNE. We can't even continue to support our program. We are cutting back in every phase. There have been widespread proposals to eliminate athletic grants for baseball, track, golf, tennis, and everything that does not make money. That is what the NCAA is doing right now.

Mr. ROYAL. If we had the money, available to support women's intercollegiate athletics, I don't think there would be any argument about that. I really don't. The only question is: Where does the money come from? We don't have it. If we deplete what we have, it will weaken our programs to where people won't buy tickets to see it.

Maybe the time will come in the future where women's intercollegiate athletics, through publicity and through exposure, will be able to be self-supporting and the public will buy tickets to come see their events.

Mrs. CHISHOLM. No further questions.

Mr. O'HARA. Mr. Eshleman.

Mr. ESHLEMAN. Thank you, Mr. Chairman.

I don't feel we should direct all our questions to Mr. Royal. If any of the coaches wish to reply, feel free to do so.

Where do the profits go now in football and basketball, the big money raisers? Basically where do the profits go now?

Mr. **Royal.** To support every program at the University of Texas—to support every program except football. Football is the only profit sport in our program.

Mr. **Eshleman.** Would that also include support of every female program on that campus or does it support every male program?

Mr. **Royal.** This is what I was saying——

Mr. **Eshleman.** I am not talking about equality now but the profits of basketball and football. Say in 1972, did some of those profits go to support female sports programs?

Mr. **Royal.** Not at the University of Texas. But the University of Texas has appropriated moneys for the women's program presently. They are getting money from the university.

Mr. **Eshleman.** Out of the college budget?

Mr. **Royal.** Yes, out of the college budget. The men's program gets none. We are 100 percent self-supporting. The women's program gets that money from the college budget, from the university.

Mr. **Eshleman.** I have one more question, and this would be more appropriately directed to the dean of women or female coaches, but how many complaints have there been on the campuses about unequal treatment for women's sports? Is that a predominant subject on the campus?

Mr. **Blackman.** If I might answer part of that question, I think there are certain groups that make it seem like intercollegiate athletics and the NCAA are the villains who suppress women's athletics. I think that the facts simply don't bear that out.

Up until recent years, there has been no great interest in women's programs. We have seen some figures here; for example, the years 1967 to 1974, the number of women participating in intercollegiate athletics has increased 300 percent. The number of intercollegiate institutions who field five or more women's teams has increased 5 percent during this period of 6 or 7 years. It can be said that that is because they had so little to begin with, but there was not a demand for it prior to that time.

Mr. **Eshleman.** You mean demand from the female students themselves?

Mr. **Blackman.** That is right.

The major point we are making is that we think the way the guidelines are written now that not only will it hurt men's athletics but it also in the long run will hurt women's athletics because at many schools, unlike the University of Texas, what women's athletic programs they do have still come from the revenue-producing sports. Obviously if that revenue goes down, not only will the other men's sports suffer but many of the women's sports will suffer also.

Mr. **Eshleman.** That is all, Mr. Chairman.

Mr. **O'Hara.** Mr. Mottl.

Mr. **Mottl.** No further questions, Mr. Chairman.

Mr. **O'Hara.** Mr. Quie.

Mr. **Quie.** Thank you, Mr. Chairman.

I really would like to engage Mrs. Chisholm with a question. In title IX, you have the requirement that "No person shall, on the grounds of race, color, or national origin, or on the basis of sex, be precluded from participation in any program or activity receiving Federal financial assistance." In the sex discrimination, title IX, under: "prohibition of discrimination against the blind"—we wrote specifically that no blind person should—"be denied admission to any course of study by a recipient of Federal financial assistance."

We wrote that to make certain that the blind would not be discriminated against in any program in the institution, where, in the other two, we wrote the "activities and programs." It seems, like the sports rule, it should be limited to the activity of the program, and not inclusive of any program within the institution. So we have two places, one a sports ruling and another on where it was written two different ways in title IX.

I am wondering, then, if it could not be properly construed, as the coaches have suggested, that athletics are not financed in any way by the Federal Government and therefore are outside the scope of HEW guidelines. I think you have the most expertise on this. I want to ask whether you want to defer this to a later time.

Mrs. CHISHOLM. One thing that runs through my mind is my understanding—and correct me if I have the wrong understanding—that the University of Texas is in the process of building a tremendous stadium. Am I correct? Are you building an athletic stadium which will be in receipt of some kind of funds? I want to be sure I have that information correct.

Mr. ROYAL. They are building a special events center which will have an all-purpose function. Now, athletics will be part of that but also women have been considered in the building and in the space allocated in that building.

Mrs. CHISHOLM. I just want to make a point. Where are the funds coming from to build this stadium?

Mr. ROYAL. I don't know, because it is not coming from the athletic department. I don't know where the funds are coming from.

Mrs. CHISHOLM. Are any funds coming from the Federal Government?

Mr. ROYAL. I don't know.

Mrs. CHISHOLM. I am trying to see whether or not the money comes from the Federal Government. And I am looking at the overall issue of civil rights. I am also looking at it from the standpoint that the sports arenas or stadiums are being built for the propagation of sports, and that male and female students do pay to attend these sports events with their students fees. They must pay these fees whether they want to attend these sports activities or not. I just want to be sure that this is understood because it indicates an indirect source of funding. It does not have to be a direct thing.

Mr. QUIE. I think you make the point that if any of these facilities are constructed with Federal funds, they therefore become a program activity funded by the Federal Government. In the same way, in the Academic Facilities Act we prohibited the use of a federally funded building for any religious instruction or worship.

Let me ask one of the coaches: It is my understanding that one of the reasons that no stress has been made to limit the meaning of title

VI of the Civil Rights Act of limiting it strictly to activities and programs is so that no one can make the case on the basis of race that there is any difference between individuals; but some people indicate that, on the basis of sex, there is a difference in individuals and this is evident even in HEW's regulations, where they do not require that females be permitted to participate on the same team in contact sports with males.

How do you see this? Is there a difference between individuals on the basis of sex and is there a difference between individuals on the basis of their race? I recognize that each individual is unique. You are different than I am. But I am talking about those two aspects—one, race; and the other, sex.

Mr. BLACKMAN. I would say that HEW has already done this, because they have already stated in there that because of physiological differences between men and women, the women are not expected to compete in the so-called contact sports. They list a number of them—hockey, football, basketball—as contact sports. So they have already stated the fact that there are differences.

If I may, I would like to point out one thing to Mrs. Chisholm, that I am not familiar with the various schools but each school is somewhat different in the athletic property they own. At the University of Illinois anything that is owned by the Athletics Association, which is a complete and separate corporation from the university, has been paid for 100 percent in one of two ways—either by revenue raised by sports or by contributions from interested alumni. Those are the only facilities in the campus that are run by the Athletic Association.

We have what is called an assembly hall, which, I gather, is something similar to the building that is going to be built at the University of Texas, where basketball games are played, but this building is not under the direction of the athletic department.

Darrell just said the same thing—the new building at the University of Texas is not being run by the athletic department but is being run by the university and will be used by any activity they wish.

Mr. O'HARA. I am going to have to interrupt now. There is a full committee meeting today and, under the rules of the committee, the subcommittee must defer to the full committee. They are just barely lacking a quorum. Those present here, if they went to the full committee meeting, would make up that quorum.

So we are going to have to recess the hearing and we will be back as quickly as we can. We would appreciate it very much if you gentlemen would remain and be available, those of you who can. If you have a plane to catch, of course, we will understand. But those of you who can, if you can remain to respond to any further questions that might be directed to you. And when we reconvene later on this morning, we will do so around the corner in room 2261, which is a larger room where everyone, I think, will be able to find a seat.

So the committee will now stand in recess.

[Whereupon, a brief recess was taken.]

Mr. O'HARA. The subcommittee will be in order.

We have recessed and we have assisted the full committee in getting underway in its mark up of legislation.

I warn you now that when somebody down there gets upset because their amendment has not carried and makes a point of order that a quorum is not present we are going to have to run back down, or when they get to the question of the final adoption or reporting of the bill we will have to get back down there probably because it requires a quorum to do that.

So, I don't know how much longer we are going to be proceeding. I do appreciate the witnesses waiting for us. I just wanted to say to you that I hope you appreciate that football coaches aren't the only ones who led hectic lives. We find it very difficult to run orderly proceedings around here.

Mr. O'Hara. The Chair would like to recognize the gentleman from Illinois, Mr. Simon.

Mr. Simon. First of all I was asked by the Chairman of our full committee, Mr. Perkins of Kentucky, to acknowledge the presence of Cliff Hagen of the University of Kentucky.

I don't know where he is. There he is. I have done my duty by the chairman of the committee.

Mr. O'Hara. You can't get ahead of Mr. Simon. He is making points with the Chairman.

Mr. Simon. I also want to make points with the distinguished coach from Illinois, too. We are happy to have him here. I hope you get a few tips from your neighbor, Mr. Royal, on a winning season.

Mr. Chairman, you mentioned three possibilities. It seems to me there is also a fourth possibility. That is, after examination of the regulations by HEW that there could be some slight modification of those regulations so that we can in fact continue with sound programs that we have had and at the same time recognize that we haven't done the job for the female athletes that ought to be done.

I think that is generally recognized. One of the things that I would hope we would do, Mr. Chairman, is also, meaning no disrespect to the distinguished lineup of coaches, get some women coaches here to testify before the committee before we make a decision.

Mr. Royal, you mentioned a point about dividing revenue that was not very clear to me. I wonder if you would expand on that.

Mr. Royal. I mentioned that when the presidents and the chancellors are saddled with this obligation to match dollars for dollars they are going to have to make a decision how this will be brought about.

One source where I am sure this will not take place is that they will not match funds that we are now generating. We are generating about $2,400,000 a year from our football program basically.

Mr. Simon. Is that net or gross?

Mr. Royal. That is gross. They are not going to be able to match that. They are going to say, "Quit making money." When you say quit making money, that means get out of business.

The next step will be to say that we will divide the money, the income that you have will be divided equally between men and women, the income you have from football.

Then if all sports are weakened they would become unattractive for people to buy tickets to see. So that would not be good because our revenue would go down.

Now, the last one that I mentioned, the last proposition they may come up with, is that you leave football and basketball, which are the revenue-bearing sports, they are profitable, they are making money, leave them in existence as they now are and run the program exactly the same way, but take the profits from those sports and give that to women's intercollegiate athletics and do away with men's golf, swimming, tennis, track, baseball, eliminate those programs completely.

This is the only other way I can see that we can get matching funds.

Mr. SIMON. What is your total athletic budget for University of Texas?

Mr. ROYAL. 2.4 million.

Mr. SIMON. That is the revenue you generate from football and basketball.

Mr. ROYAL. Football basically.

Mr. SIMON. There is also some tax expenditure, is that correct, for your athletic program?

Mr. ROYAL. No.

Mr. SIMON. None at all.

Mr. ROYAL. No.

Mr. SIMON. Would that be true at the University of Illinois?

Mr. BLACKMAN. I am not sure that I fully realize what you mean by tax expenditure.

Mr. SIMON. In other words, at the University of Illinois the athletic program is not a fully self-supporting program?

Mr. BLACKMAN. It is completely separate. The physical education program is under the university and is run like any other, whether it is botany or anthropology, whatever department it might be.

The Athletic Association is a separate corporation. It receives absolutely no State funds or Government funds of any kind. The funds come from only two things; No. 1, from income of football or basketball, or No. 2, contributions from the men about the State who make a contribution to provide scholarships.

Mr. SIMON. Are you paid under the P.E. program?

Mr. BLACKMAN. No, sir, by the Athletic Association.

Mr. SIMON. Is that true of all the coaches?

Mr. KUSH. Arizona State gets one-fourth of our salary from the State.

Mr. ESCH. At that point are you involved in teaching classes?

Mr. KUSH. Yes, sir, we are.

Mr. ESCH. To the extent you are teaching classes is the degree to which you are compensated for that?

Mr. KUSH. Yes, sir.

Mr. SIMON. One final point.

On page 21435 here it says "Clearly it is possible for equality of opportunity to be provided without exact equality of expenditure. However any failure to provide necessary funds for women's teams may be considered by the Department in assessing equality of opportunity for members of each sex."

It does seem to me, as I read the regulations, that there is some flexibility, flexibility that at least news accounts did not portray very adequately. Is that an accurate reading or is that not an accurate reading?

Mr. ROYAL. What page were you on?

Mr. SIMON. Page 24135 in the Federal Register that I have here. It is the analysis.

Mr. ROYAL. If you go to 25143——

Mr. SIMON. I am losing you here.

Mr. ROYAL. You talk about equal opportunity.

Mr. O'Hara. 86.41(c).

Mr. Royal. Now, you see the things that are listed that we have to come up with equally, then we have talked about equal money, too.

If we comply with these things we have spent an equal amount of money. It says over there we don't necessarily have to come up with equal money but if you read on you will find that we do have to come up with equal money.

Mr. Blackman. Mr. Simon, if I may make a point on this, concerning equality and discrimination, on the very points listed here there has never been equality in any college athletic program.

For example, the baseball team, I think every coach here has probably played baseball and likes the sport but the baseball team does not have the same type of budget as the football team. They probably don't travel quite as well for the simple reason that people don't pay to see college baseball and the college football program supports them.

Most baseball coaches are very grateful if they have a program at all because they know they wouldn't have it if it were not for the profit from football or basketball.

They go on here mentioning traveling's per diem allowance, scheduling of games and practice assignment and compensation of coaches and tutors and so forth. There is not equality at this time.

Mr. Simon. As I read this regulation, again it does say that you have to provide travel allowance and other things, you have to schedule games. It does not say that you have to spend the same number of dollars.

Mr. Royal. Would the Director of OCR say that?

Mr. Osborne. Mr. Simon, I think I know what I am talking about here, but at the University of Nebraska we have 250 men out for athletics. Two hundred of those are on athletic grants which would be approximately 80 percent.

We must then provide financial assistance to a like proportion of women. Let us say 100 women come out for athletics next year, then 80 of that 100 should be on grant and then we have to provide travel, coaches, medical facilities, and so on.

When the funds are available I can see very quickly you could have maybe 200 women out for athletics. In that case you would have to give 80 percent of those women athletic grants, coaches, the whole works.

We may not be talking immediately about Texas coming up with $3 million for women but you are talking at least of $1 million, within a year or two very possibly $3 million.

As you can see from examining the budgets, I have a copy of our budget here, we have a break-even budget and we have one of the healthiest programs in the country.

Bo has one of the best in the country, they are breaking even. Where are you going to come up with a million dollars? These schools here represent some of the best off financially. Most everybody is in the red now and cutting back.

Mr. Simon. I recognize and I think we all recognize that this is going to demand an additional expenditure. I frankly think that is the direction we are going, there is going to have to be an additional expenditure. How we work that out I am not sure. I just point out that at the end of this very paragraph that you were reading here about the various scheduling and so forth, again at the bottom it says—this is the regulation itself at the analysis, "unequal aggregate expenditures for members of each sex or unequal expenditures for men and women teams if the recipient or operator sponsors separate teams, will not constitute noncompliance with this section."

So there is some flexibility. I think what the committee wants, what you want is some regulations that you can live with and yet regulations that will push us in the right direction. I think we have to recognize that we have had some failures here in the past in not encouraging female sports.

Mr. CLAIBORNE. It will have to be written regulations to where HEW cannot be the sole judge of what you read there. It says it doesn't have to but again who is going to be the judge unless there are some written laws and regulations that say just what that means.

Mr. SIMON. These are the referees and officials, unfortunately, in this particular game. Whatever regulations are written, I think ultimately adopted, HEW is going to call the play.

Mr. ROYAL. That very next sentence, Mr. Simon, where you stop, go ahead and read that next sentence after that.

Mr. SIMON. "The Director may consider failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each section."

Mr. CLAIBORNE. That is, the next sentence says they can.

Mr. SIMON. It is a factor in the expenditure but that particular sentence does not bother me frankly as much as it may some of you.

Mr. O'HARA. The Chair recognizes Mrs. Smith.

Mrs. SMITH. Thank you, Mr. Chairman.

I would like to direct some questions to our Nebraska coach, Mr. Osborne, and I would like to point out first that we are very proud of the athletic program in Nebraska.

We are not only proud of our football team but we are proud of the athletic program across the board.

Do I understand correctly, Mr. Osborne, that our football team is making the money to support nine additional sports programs in Nebraska that get into Federal funding and no State funding—that are supported entirely by our football team?

Mr. OSBORNE. That is correct.

Mrs. SMITH. Including wrestling, swimming, and other programs?

Mr. OSBORNE. That is correct. Of course, all these sports operate at a deficit, $7,000 to $140,000 deficit. The only State funds that we have at the present time, we are building a coliseum which is an all-purpose complex, the State fair will be there, with a State cigarette tax which is building that building.

But all scholarships, all coaches' salaries, the whole works is strictly from gate receipts and also private contributions.

The private contribution is one area we have not touched on too much. As I understand it if we get $200,000 in private contributions we must come up with a like amount in contributions for women's athletics. That is the way it has been explained to us.

Obviously it is going to be very difficult to get $200,000 in contributions for women's athletics. The only alternative would be to submit the $200,000 that we now receive equally for men and women.

Again you are going to have some trouble with booster groups if that happens to this money. Again I think these private contributions are going to dry up on us.

I would like to say one thing, Mrs. Smith. It seems to me that the basic question in front of this committee is whether HEW belongs in this area or not. We keep talking about ways we can implement this, but I am not sure really that that is the question.

The question is, is this legal? If you find it is not legal then we don't have a problem of how we are going to implement it. If you find it is legal then we would hope you would try to come up with a workable solution where we can continue to survive.

If not, if you implement it as we read it, we won't survive. There are probably three gradations.

Mr. O'HARA. Will the gentlewoman yield to me for just a moment?

Mrs. SMITH. I will be glad to yield.

Mr. O'HARA. As one who has had extensive experience in dealing with affirmative action programs as applied to universities I think I can help in explaining that provision of the regulations you are concerned about.

You will notice it is worded in such a way that nowhere in section 8641(c) is there any direct explicit requirement that expenditures be equal.

They say, "In determining whether equal opportunities are available the Director will consider," among other factors, and then they run through a list of things, travel, per diem, scheduling of games, practice time—and so forth and so on.

Then they say, "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams, will not constitute noncompliance with this section but the Director may consider the failure to provide these funds for teams of one sex in assessing equality of opportunity for members of each sex."

This is the classic way of doing it. They don't say that you have to do this but they say one way that you can avoid having your university declared ineligible for Federal contracts and whatever is to do these things.

And if you don't then maybe, maybe not, you see.

So, in effect what it does is put a tremendous amount of pressure on you to comply with these things that they say you don't have to comply with because you recognize that if you do that you are safe.

There is no one that can come along and say you violated the regulations.

On the other hand if you don't do that you are put in a position of having to explain how it is that you are not in violation and maybe they will accept the explanation, maybe they won't.

So, the easy way out or the simple way out and one always seeks the simple escape from bureaucratic regulation, is the simple way out is to stay, well, let us do it even if they say we don't have to.

I think that is the problem you face.

Now, Mr. Schembechler, let me ask you a question if I can.

Will you describe for us the nature of the funding of your athletic program at Michigan and what effect do you think these regulations might have on your program?

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Mr. SCHEMBECHLER. Mr. O'Hara, for the benefit of channel 4 in Detroit I want to make one point perfectly clear and that is that I am very much in favor of increasing revenue for women's athletics. I think we all recognize there is a great need for it because in the last 5 years women have been very much interested in the competitive aspect of athletics.

So, we have to fill that need. By the same token we can best help them if we continue to have the athletic programs, particularly in football at Michigan because football generates all of the revenue, all of the revenue for our entire athletic program, both men's and women's.

It maintains all the facilities, and owns the facilities, and has built the facilities, that are being used presently by both men and women.

If we were to cut back our program on the basis of having equal revenue for both men and women, then our football program in competition with professional teams in Detroit would not bring in an average of 93,000 people per game to watch our team or generate revenue of somewhere around $2.8 million.

Now, with that kind of money we are still, because our other sports are nonrevenue sports and football has to finance all of them, our surplus at the end of the year is very, very, slight.

Now, I think that Don Cameron, our athletic director, recognizes the importance of increasing the budget which I think we have done for women's athletics but I can see if it is dollar for dollar there is no way that that many people are going to come to a Michigan football game and if they don't there is no way we will finance intercollegiate athletics, men or women. That is the way we feel about it.

Our point is, as has been mentioned so many times, that we have no Federal funds whatsoever. All of our revenues are generated through gate receipts primarily from football and through donations from our alumni.

Mr. O'HARA. Thank you very much, Mr. Schembechler.

I thank the gentlewoman for yielding.

Mrs. SMITH. I would like to make the comment, Mr. Chairman, in line with what you said, I agree absolutely that with this setup the HEW Director will have tremendous authority in this field.

I want to go on record as saying I think the HEW Director has far too much authority. I don't think we should be extending this kind of authority so that our institutions of higher learning will be constantly up against the gun trying to determine whether they are in compliance or whether they aren't and trying to prove their point.

We have this in the Federal Government with this kind of power in many fields, in education, in health, in highways. I am opposed to extending this kind of power to the Director of HEW in regard to this particular area.

I think the regulations ought to be explicit and that Congress ought to agree with them and we ought to be able to easily understand what they are rather than start down the road with years of questions and issues.

Mr. O'HARA. I thank the gentlewoman.

I now would like to recognize Mr. Schembechler's Congressman, my colleague, Mr. Esch.

Mr. ESCH. Thank you very much, Mr. Chairman.

I come with two or three biases. My first bias that I should emphasize this morning is, I wonder what really would have happened, Mr. Chairman, out on the west coast the last 2 years if the Big Ten had sent its best football team to the Rose Bowl.

I speak also though, Mr. Chairman, with the bias that you and I served on this committee during those trying days of the late 1960's and at that time we came within one vote of putting out on the floor, and it surely would have been passed, a bill that would have stated that every institution in the country would have had to submit their regulations to HEW as to how they were going to handle the student riots that were taking place prior to receiving Federal funds.

You will recall that you and I and Congressman Steiger from Wisconsin fought that in the committee and turned it around because we felt that the strength of our institutions of higher education was in their independence and that the Federal Government did not have and should not have the responsibility for entering into that area of academic freedom.

I think that that is the context that we are in today.

I want to ask one or two questions first of our coach but also of the others.

Is there anyone at the table who would say or would you say, Mr. Schembechler, are you in favor of having more women participate in athletics?

Mr. SCHEMBECHLER. I don't think there is a coach in the country who would object to that.

Mr. ESCH. You are not really saying they should become the centers for the Michigan football team?

Mr. SCHEMBECHLER. I don't think that is possible.

On the basis of the athletic dollar which is what we are talking about here people are going to come to see the sports that they want to see. It has always been football and basketball, men's.

Consequently, particularly in our area when we compete with the professionals for the dollar, and you may like it or not, either you bring in the money or you don't have a program.

Mr. ESCH. But that does not mean that you don't support the idea of additional dollars for women's athletics.

Mr. SCHEMBECHLER. Not at all.

Mr. ESCH. And additional programs?

Mr. SCHEMBECHLER. Not at all. I am very much in favor of the women. The only thing I am concerned about is, are we going to destroy the men's programs to promote the women's? I don't think that is the way to go about it.

Mr. ESCH. The other question that I had, a very basic question, and I am sure it has been emphasized before, is that title IX mandates and I quote "That no person in the United States shall be subject to discrimination under any educational program or activity receiving Federal financial assistance."

Now that is the very basic question that this committee has to decide in looking at these regulations. In terms of any of the programs that you gentlemen represent are any programs or activities receiving Federal financial assistance?

Mr. ROYAL. No, sir.

Mr. **Kush.** No, sir; not directly but through the State funds we do in various sports. Previously we used to have 2 or 3 baseball scholarships, then we went to about 25, track the same way.

Now, we presently have a great number of female scholarships primarily because of the revenue derived directly from football. We do receive some State funds that they pass on in the tuition and fees, both the female and males.

Directly what it amounts to and what we are concerned about is that if we try to equalize the income then I feel that all of them are going to directly be cancers to the point where we will not have the programs that we have presently.

Mr. **Esch.** What the real concerns at the table are, to take an example, we have a special turf at the University of Michigan for a practice field for the football team, and many of you do too I think, and special practice facilities for the football team.

You have done that because good business practices dictate you ought to provide those facilities in order to have a better football team I assume.

Is it your interpretation that you would have to provide equal facilities for a woman's football team? Is that your concern?

Mr. **Kush.** Yes, sir.

Mr. **Claiborne.** You would have to do that or give equal time on that practice facility.

Mr. **Schembechler.** We are already doing that. They have equal opportunity to practice on the field. As a matter of fact we put up lights to make sure it is used as many hours as possible.

Mr. **Esch.** The concern is that you have to provide equal facilities. The question is not whether or not you provide equal facilities for men and women but also the implications from the regulations that you would have to provide equal facilities for all different sports.

Mr. **Kush.** Definitely.

Mr. **Esch.** My question is, do you really think HEW should be in the business of making a determination about what type of sports have interest on the part of the students?

How much demand have you had for increased participation in the minor sports at your universities?

Mr. **Royal.** Very little. The interest still comes around football and, in some schools, basketball and football. But that is where the real interest is. That is the reason for the revenue. You can tell how much interest there is and how much pressure there is for that sport simply by checking the income.

For instance, we were taking tickets at swimming events. We had a ticket taker there. We found we could not sell enough tickets to pay the ticket taker, so we let them in free.

Mr. **Esch.** I am not talking about dollars but individual students who are interested in participating.

Mr. **Blackman.** I think at almost all schools if we give an honest answer there are every year some students who would like to expand the athletic program.

At the University of Illinois at the present time there is a strong demand, why doesn't the athletic association take over Lacrosse? We are a school of 35,000 students. There are probably 30 students who want to play Lacrosse. They write letters to the daily student paper and so on demanding this.

Once again it comes back, it is a fine sport but where are the finances going to come from?

Mr. Esch. Should those determinations be made within the institution's program or should they be made by HEW?

Mr. Claiborne. We think they should be made in the institution. We think the way the regulations are written the kind of athletic programs which the colleges offer will be determined by HEW. That is one of the things that concern us.

Mr. Chairman, when I came to the University of Maryland several years ago it was just about to go under because the average attendance was about 15,000 at football games.

Since then the program has improved some and the attendance has increased to about 40,000 now and through this revenue we have probably more intercollegiate sports than anybody at this table.

We have about 13 intercollegiate sports. Our Lacrosse team was national champion last year. Our tennis team was the best we have had. We have eight women sports at the University of Maryland.

If football and basketball, which is a revenue producing sport at the University of Maryland, also was not producing revenue, then we would not have 13 intercollegiate sports and we could not have eight women sports.

Mr. Esch. You are recognized as having done that and other institutions are doing it too. But the implications are there from my friends who have worked hard to make sure that women have equal opportunity.

I believe in that. As a matter of fact, my daughter was discriminated against at Duke one time because she could not run on the track team.

The question I would ask is how and to what degree, can you encourage or open up the participation?

If women have more encouragement to participate, more of them will participate. How do you answer that question? How can your institution begin to ascertain what sports women are really interested in pursuing? On what basis can you do that?

Mr. Blackman. I believe we all have women athletic directors now.

The athletic staff of women at the University of Illinois has greatly expanded in recent years. Certainly they get an input as to what the demand is.

I would like to make the point that I sincerely believe every coach at this table believes in their hearts there are advantages to be derived from intercollegiate competition and certainly women will gain some of the same benefits as men.

I think there is no question about the women's program being desirable if it is something they will enjoin and be interested in.

I think in most cases in the women's programs themselves our own women's athletic director determines in what sports the real interest lies and we now field women's teams in those sports.

Mr. Claiborne. I also think a lot of these programs in our intercollegiate program now started out as club programs, actually started out as intramural. As interest increased they went to club. As interest in finances became available they became intercollegiate teams.

Now they say, bang, we have to make women's athletics on the same level with the men's and they have not had a chance to create the interest.

The interest in women's 59 athletics has been evidenced in the last 5 or 6 years. As this interest increases everyone is trying to help and improve more programs.

Mr. Esch. Mr. Chairman, I have taken more than my share of time. I am very much concerned about the regulations and relationships to title IX and the explicit character of that language that we drafted in title IX and what the regulations have implied from that.

I share the great concern of many individuals in the country that we ought to encourage and further develop women's athletics but I am also very much concerned that the Federal Government might be moving into an area first of all in which Congress did not mandate or give them authority, and more specifically perhaps that we may in the process be destroying or weakening programs that have been the heart and strength of the American system and have not only provided that opportunity for participatory sports but also spectator sports.

As a Republican, I know what a spectator sport is now, it is a Republican in Congress. [Laughter.] But the concept of spectator sports and what it does to the esprit de corps within a university, and I have lived through it at the University of Michigan, those times when the university was torn apart, and I have seen now the university brought together, Mr. Chairman, on a Saturday afternoon as never before in the last few years.

I think we ought to maintain and recognize the strength of that. I think equally significant perhaps is the concept, whether we like it or not, and I think there have been some cases of abuse, of what the sports have done for our minority students and the degree to which it has been a gatekeeper.

In many cases there have been cases of abuse. That is certainly an area we ought to look into sometime.

That generalization can be made, nevertheless, it has been a great strength and encouragement to minority students and has provided them an opportunity for their lifetime activity and to move into other fields that they would not otherwise have.

Mr. Chairman, let me recognize you as one who, without question, would have the liberal credentials as no one else in this Congress and that is why we are glad on your shoulders rests the initiative as to whether or not you are going to introduce a bill in the next month that will turn back the regulations.

Mr. O'Hara. I thank the gentleman from Michigan. If it were not for the honor of the thing I would just as soon walk.

Mr. White. The University of California at Berkeley always has a connotation that is good and bad to different people. I think maybe I can mention a couple of things to reemphasize the point we have made.

We don't feel, No. 1, that these regulations are specific enough. I think probably some of the things that have been mentioned would bear that out.

In our conference on the West Coast, for instance, there is a real difference of opinion as to whether they want to continue with a broad spectrum of intercollegiate athletics.

Several of the universities in our conference have had to give up sports, either the scholarships for those sports or just give up participation in those sports all together.

I think for this reason the very point we have tried to make today is that we think it is important that a study be done of intercollegiate athletics and a study be done to see what some of these problems are because we are facing the problems—and at the university we are trying to maintain, we are a couple ahead of you, 16 intercollegiate sports with 2 national championships—because of some of the problems that have been inherent with us where we have had no television revenue for 4 years because of probationary states.

If you want to fight the professional teams you ought to come to the bay area because there are enough there to sink a battleship.

Mr. CLAIRBORNE. There are a few in the District of Columbia too.

Mr. WHITE. That is right I think it behooves this committee to push strongly to study this and look at it the way the athletic departments are looking at it.

If you look up and down this table, and I maybe represent a little different faction, we want to maintain 16 intercollegiate sports at the University of California.

We also want as many women sports as are feasibly possible. Somewhere down the line the whole thing is going to fall apart if somebody does not study it and look at the financial implications of it.

Mr. O'HARA. Thank you, Mr. White.

We have another witness.

I am going to recognize Mrs. Chisholm again.

Mrs. CHISHOLM. I will be very brief because I have spoken before.

I think we must be very sure that we address ourselves to the issue. The basic issue as I see it is whether or not the scholastic association such as your group is in receipt of public funds, whether or not you should not be asked to follow these particular guidelines.

Most of you have said that there are no Federal moneys whatsoever in your programs.

Well, if that is really so, there are no Federal moneys in your program, it would seem to me that we cannot even get into the area of moral responsibility, that we probably would have to constantly rest our case on legal responsibilities.

But if we rested it on moral responsibility, if you didn't want to have women in the program we couldn't force you to.

One of the things that is very important is that Federal aid to one kind of school activity can be indirect financial assistance to other kinds of school activities.

For example, the student fees and scholarship programs, the bonds that are put forth to build school stadiums, to that extent it may not be direct, but it is indirect and it means, therefore, that your university may be indirectly in receipt of public funds.

Then if this is the case, it would seem to me that you must follow the guidelines.

I think you would have to show that you are administratively separate structures. You will have to show by substantive evidence, that you should not be brought in under this particular regulation.

One other thing. You are constantly referring to the fact that you have to be able to draw the kinds of crowds that have an interest in certain sports in order to generate the revenue that your universities have been used to generating.

I have to assure you that Billy Jean King is just as exciting as Joe Namath. The fact of the matter is that women never have really had an opportunity.

When you think of the Olympic gold medalist, Donna DeVarona, and the fact that there was no school that would offer her a scholarship, it is tragic. I could go into case after case. The universities have never made a serious attempt, whether under Federal control or not, to really reach out to would-be female athletes and there are hundreds of them in this country.

All I want to say in conclusion, Mr. Chairman, is that to me the basic issue is if they are in receipt of Federal funds, directly or indirectly, it seems to me that we cannot have discrimination on the basis of sex.

If they are not, even though we may have moral feelings about it, we cannot ask them to fall under these guidelines.

Mr. O'HARA. I thank the gentlewoman for her fine contribution in summing up the situation as she sees it and it is an able presentation and a good note on which to end this portion of this morning's hearing. We are going to be going back downstairs for about 10 minutes to vote on reporting the bill that is now before the full committee.

They are ready with the motion to report. We will be back in about 10 minutes. When we get back we will hear from Kathy Kelly who is president of the National Student Association.

I want to thank the representatives of the American Football Coaches Association for being with us today.

Mr. ROYAL. Thank you.

[Brief recess taken.]

Mr. O'HARA. The subcommittee will come to order.

Our final witness of the day will be Kathy Kelly, who is president of the National Student Association.

If you will please identify yourself for the record you may proceed in any manner you see fit.

STATEMENT OF KATHY KELLY, PRESIDENT, U.S. NATIONAL STUDENT ASSOCIATION, ACCOMPANIED BY JEANNE VONHOF, EXECUTIVE ASSISTANT, U.S. NATIONAL STUDENT ASSOCIATION, WASHINGTON, D.C.

Ms. KELLY. My name is Kathy Kelly, president of the U.S. National Student Association.

Ms. VONHOF. I am Jeanne Vonhof, assistant to the president.

Ms. KELLY. We would like to thank the committee for inviting the National Student Association to testify on the regulations for the enforcement of title IX of the Higher Education Amendments of 1972.

The U.S. National Student Association, now in its 28th year, is the oldest and largest student organization in the country representing some 750 member student government associations from all 50 States, and we welcome this opportunity to present the student viewpoint on these important regulations.

We believe that by voting title IX into existence in 1972 Congress recognized the enormity of the problem of sex discrimination in higher educaton and the urgency of implementing broad reforms. However, for the 2 years that title IX has been in effect, it has served as little more than a paper tiger.

Office of Civil Rights Director, Peter Holmes, has said that the backlog of title IX complaints must wait until the regulations are adopted, claiming that publication and approval of final regs are essential to an effective compliance program.

In this light, NSA views the adoption of these guidelines as a positive and necessary step toward the goal of insuring equal educational rights for women and men. We therefore urge your approval of the title IX guidelines as approved by President Ford.

Title IX is the first Federal legislation to directly and broadly address the problem of sex discrimintaion as it affects students, themselves.

As such, the potential positive impact of title IX on the futures of thousands of American students, and on the very fabric of American Society, is enormous.

We do not realistically believe that title IX will be effectively implemented in the absence of enforcement guidelines, although we might have hoped that the guidelines would be more comprehensive and go farther in eliminating sex discrimination from all aspects of American education. We feel strongly that the regulations must go into effect now, without any additional delay.

Every day, sex discrimination in education denies people the right to fully participate in our society. Every day, sex discrimination denies society the talents and resources of many of its members, most often those who were born female.

Women students encounter discrimination time and time again in the course of their academic careers. Women are treated as second-class citizens in almost every walk of campus life: in admissions, in departmental quotas, in counseling, in applying for financial assistance, in campus employment, in job recruitment, and in admission to graduate schools. The irony is that such discrimination is so traditional and all pervasive that it is almost invisible.

For instance, when I was admitted to the University of Minnesota, I was unaware of the fact that men were accepted with a C average, but women were only admitted with a B average or better.

Over the past 5 years, student awareness of the consequences of sex discrimination has grown tremendously. In the past year alone requests for workshops on title IX at NSA's 14 regional area conferences have more than tripled. Every week our office receives requests from student governments across the country asking how they can best monitor the level of compliance at their institutions.

And although we can supply general information on the law and complaint procedures, they want to know what their rights are specifically. And in the absence of final guidelines we are unable to tell them.

It is evident that students no longer view sex discrimination in terms of isolated cases, but rather as a consistent and historic pattern of denial of basic rights and privileges.

Title IX is a front-page issue for many college newspapers. A recent story in one paper headlined "Title IX Unenforceable Until HEW Provides Guidelines" asked: "When is a law not a law?"

The answer is evident, in the absence of clear guidelines and enforcement procedures. Students need a strong law which protects them from discrimination on the basis of sex, and they cannot have one without the regulations which will implement the law.

We would like to comment on several sections of the regulations which we feel are especially relevant to students.

We wholeheartedly support subparts B and C which prohibit sex discrimination in admissions and recruitment.

This is an especially crucial issue in our graduate and professional schools. The number of women in professional schools is still far below 15 percent.

The rationale for discriminating against women at this level is largely based in the myth that a woman will be less likely to use a professional degree than a man, and that even if she does use it, it is not as important for her to be working as it is for a man.

It should no longer come as a surprise that women who go to the trouble and expense of obtaining a professional degree intend to use it.

Women are as serious about working as they are about their education. They work because they have to, and their sick leave and turnover rates are slightly less than those of men.

Yet women, who are 39 percent of our country's work force, earn little more than half of what their male counterparts earn—56 percent. Limited admissions of women in professional schools means limited participation by women in the economic life of the Nation.

As professional schools have begun to open their doors, women have rushed in. In law schools, for example, the percentage of women students jumped from 5 percent in 1965 to 16 percent in 1972.

However, without the present regulation, there is nothing to prohibit an institution from establishing a new quota system, which might determine for example, that no more than 25 percent of a student body could be female. The regulations specifically prohibit quota systems and will promote a more equitable admissions system nationwide.

Ms. VONHOF. Any student knows that acceptance by an institution is only half the battle. The hurdle that stops many women cold is financial aid. Except for title IX, there is no Federal law that directly prohibits postsecondary institutions from discriminating against women in financial aid policies.

A nationwide pattern of discrimination in financial aid awards already exists. Women undergraduates are less likely to obtain financial aid than male undergraduates, although they are better qualified on the average.

Women must rely more heavily on loans, which are also more difficult for them to secure. Some institutions have been known to slash a woman's financial aid in the last years of her education, leaving her with a low chance of finishing her degree, because other forms of aid are less available to her than to men.

On the postgraduate level, economic discrimination against women sharpens. In 1972–73 about 80 percent of the Nation's most prestigious fellowships went to men, although women comprised some 40 percent of the undergraduate population.

The Federal Government administers a substantial number of these award programs. In many programs a higher percentage of qualified women apply for these grants than the percentage of women who finally receive them.

An even more alarming fact is that the number of women who are qualified for these programs far outstrips the number who actually apply.

Often women are not advised that a particular type of aid even exists, or that women are eligible for it.

In addition, practically all Federal scholarship and loan aid is for full-time study, as is true of most private scholarships. This policy makes it extremely difficult for those students who are married and who may need a part-time schedule to receive such aid.

The Carnegie Commission on Higher Education found that about half the married men in graduate school are enrolled full time as compared to about one-third of married women.

Studies show that women also have fewer opportunities for employment both during the school year and in the summer, and they are paid less.

One survey, by Haven and Horch, revealed that the average yearly amount earned by men in college, $847, was more than double the average received by women.

And many bright, qualified women relinquish an academic career before they even begin it, when they realize that a female professor with the same or better qualifications than a man will have about half the chance he does to become a full professor.

Once the guidelines go into effect, however, discriminatory financial aid policies will be explicitly prohibited. Discriminatory counseling will also be outlawed and women will have one more weapon against job discrimination.

Students are being descriminated against today in ways that will affect their entire lives. They need a strong title IX today, and a strong title IX is a title IX with guidelines.

Last we would like to say a word about athletics, since this part of the regulations has caused so much concern at many postsecondary institutions. We concur with the HEW ruling, and athletics should be covered under title IX. To exempt athletics from coverage is literally to keep the ball out of the game for thousands of students.

Athletics are an integral part of an institution's educational program. The courts have upheld this position in many title VI rulings, and Congress itself, in the Education Amendments of 1974, ordered HEW to include provisions for athletics programs in its title IX regulations.

Learning to use and enjoy one's physical capacities is vital to a person's development and self-esteem. I do not think that anyone here would deny this or would want to deny one group physical education facilities and training, while providing these facilities for another group.

In the long run, athletics programs may be very different when women begin to participate in them as fully as men do now. But what will be changing is a system in which often 95 percent of the student body pays, through their activities fees, for the other 5 percent to develop their physical potentials.

I attended a college in which there were competitive intercollegiate teams in every major sport. However, the great attraction of the athletic program was that it was totally accessible to any student.

There was an activity for every taste, from football to yoga to karate. Most classes were coeducational, and I would say that possibly one-half of the student body participated in physical education classes at any given time. Although I have never considered myself a very athletic person, these classes become an important part of my college years.

We do not believe that the regulations will make colleges or universities move too fast in opening up opportunities for women in athletics.

These opportunities have never been available to women on many campuses, so how fast can you go from near 0?

The regulations do not call for equal spending on men's women's athletics programs, even though women's programs nationwide account for about 2 percent of total collegiate athletic budgets. The regulations do not cover contact sports, including football and including basketball, one of the most popular women's intercollegiate sports, and the one most able to gain media attention and generate revenue.

In fact we believe that the regulations should have gone further in insuring equal educational opportunity for women in athletics. However, students need the regulations in order to achieve any measure of equal opportunity in their athletic programs.

In conclusion, we urge you once again, as members of this subcommittee, to approve these regulations. We have been fighting for the regulations for a long time, and though we do not see them as a touchdown, we feel they may at least get us the 20-yard line. We have been waiting at the 50-yard line for far too long.

Ms. KELLY. Mr. Chairman, if I may, I would like to make a few additional remarks about athletics since so much time has been devoted to one aspect of that question today.

Mr. O'HARA. Please.

Ms. KELLY. First of all, the football coaches I think presented their case very well. I think it is important to note that they represent some of the most successful athletic programs in the country and that the trend really is that many intercollegiate athletic programs are in debt despite the so-called revenue-producing sports.

At the University of Minnesota, where I was a student, the intercollegiate athletic program was a quarter of a million dollars in debt one year. That was made up out of general moneys of the university. We believe this myth of money making is a general fallacy in college athletic programs. They are geared toward spectator sports rather than participant sports for most students, but these lose money.

It is also important to note that a lot of athletic programs are supported partially by student fees and tuition paid for by students. That is usually an average of about $30 a quarter.

I have a copy of a reprint from Women's Sports Magazine. This is a graph which shows the difference between expenditures in male and female programs at different universities. The University of Texas, University of Maryland, and Arizona State University are all represented here.

[The article referred to in Ms. Kelly's testimony follows:]

[From Women Sports, September 1974]

THE LONG MARCH

(By Ellen Weber)

URGENT MESSAGE

Title IX of the Education Amendments Act, which prohibits sex discrimination in schools, has been law since 1972. But a law is toothless without enforcement. In June 1974, HEW made public a draft of its Title IX enforcement regulations. The public has until October 15 to comment. HEW officials will then send a final draft to the President to be signed into law. Special interest groups representing big-time male sports are campaigning hard to weaken the regulations.

From the women's point of view, the regulations are surely not perfect. They cover all phases of school athletics, despite desperate attempts by the NCAA to have athletics and revenue-producing sports exempted. Coed physical education courses are mandatory. Single-sex teams are permitted as long as the sexes have equal access to facilities, equipment and so on. Coed teams are permissible, provided that women are not effectively excluded from participating because of differences in skills. Equal funding for men's and women's athletics is not required but there must be basic equality in the programs offered. Unfortunately, the regulations are rather vague about just what basic equality means. Schools that choose to interpret the regulations loosely, therefore, can hedge until HEW gets around to investigating them.

Another possible loophole is the section on athletic financial aid, which says that aid can be awarded on a separate basis to men and women on single-sex teams.

To get your own copy of the regulations, write to the Washington office of HEW's Office for Civil Rights, or to your regional HEW office.

HEW is being flooded with mail from those who support further dilution of the regulations, so it's essential that women's opinions be heard. Women's groups are advising that letters to HEW applaud the decision to include revenue-producing sports, but ask that schools be given more guidance on which policies will be illegal. Send comments to Peter Holmes, Director, Office for Civil Rights, HEW, Washington, D.C. 20201.

1. A FEW BIG STEPS

Yes, things are still tough for the woman athlete. Budgets, purses and salaries are still significantly below men's levels. Equipment is scarce and elderly. There are more than a few schools where the guys get outfitted from helmet to jock strap and the girls get a faded T-shirt. There are still colleges where women athletes sell apples at men's football games to pay their traveling expenses. We have not yet achieved Utopia.

But things are definitely better. For the first time since the dawn of civilization, a number of women are able to make their livings as professional athletes. State associations are increasing the number of high school championship events held for women. Even the Amateur Athletic Union, never a front-runner in women's rights, sponsored its first women's national marathon last February.

All over the country, rules, policies and timeworn attitudes toward women athletes are coming under fire. "The most positive sign of change," says Carol Gordon, president of the Association for Intercollegiate Athletics for Women (AIAW), "is that people are taking a critical look at the situation and coming to grips with the idea of women's sports." UCLA has tripled its women's athletic budget from $60,000 to $180,000 for the coming year and opened its formerly all-male varsity teams to women, Ohio State's marching band opened its ranks to women for the first time last year, breaking a time-honored tradition of 94 years. And the board of education in Shelby County, Tennessee, lifted a 30-year-old ban on girls' high school basketball just last May.

And the future looks even better. After two years of negotiations, HEW finally released its official draft of the regulations for the controversial Title IX clause of the Education Amendments Act of 1972. The regulations affirm the right of women to participate equally in all phases of athletics and will, when officially passed, make a number of traditional school policies that discriminate against female athletes illegal.

This alone is a big step. A few years ago, no one wanted to hear the horror stories from the forgotten ghetto of women's athletics. No one, except the athletes, thought it very important that Minnesota high schools had no women's interscholastic teams; that the University of Washington had no women's intercollegiate teams; that male contestants were flown to the Olympics long before the female athletes so that the men could have the benefits of increased training time. No one was too concerned that Carol Mann, top golfer in 1969, won one-quarter as much as the top male golfer, Frank Beard. No one challenged the belief that boys were naturally better athletes than girls or that they were twice as tough. Football was a big man's sport; Little League, a little man's game.

But change was in the wind. There was an increasing concern about health and physical fitness, and interest in sports picked up. The Women's Olympic Committee made attempts to reach girls at a younger age, to give them the kind of early training they would need to become top-level competitors. The greatest impetus to the revolution in women's sports, however, was the influence of the women's rights movement which made both sexes aware of the huge inequities in every area of work and play, and made it easier for women to demand access to the money, the training and the facilities available to the other sex.

As the inequities became obvious, and therefore intolerable, a few women began to do something about them. In 1969, Phyllis Graber, a high school tennis player, challenged a ruling in New York State that prohibited girls from competing on boys' teams—and New York launched its successful experiemnt in coed teams. In 1972, 12-year-old Maria Pepe, with the assistance of the National Organization for Women (NOW), filed suit for the right to compete on her Little League team in Hoboken, New Jersey. That same year, the Indiana Supreme Court ruled that the Indiana State High School Association could not keep girls from competing with boys in interscholastic non-contact sports; Barbara Dunn was appointed boxing commissioner of Connecticut, the first woman ever to hold such a position; and coeds in Florida filed suit against the AIAW in protest of its ban on scholarships for women. In Washington, D.C., Congress passed the Education Amendments Act of 1972, which contained Title IX, the clause forbidding discrimination on the basis of sex in just about every school in the country.

As the 1973–74 school year ended, girls were competing on boys' teams in high schools in over a dozen states and in junior colleges nationwide. Most were competing in non-contact sports, but there were others who were scrambling with the guys on basketball, volleyball, and soccer teams. Over 50 colleges were offering scholarships to women. And the Little League, after a series of court cases in 21 states, officially welcomed little girls.

Women had made careers for themselves in traditionally male sports. Mary Bacon was one of the top ten money-winning jockeys in the country. Women were also working on the sidelines, not as pompon girls, but as managers, coaches and boxing seconds. Rules forbidding women in press boxes had been discarded to accommodate female sportswriters. And a few men's locker rooms had signs like "Wear Shorts at All Times" because female athletic trainers were helping out.

More and more women are taking coaching courses in colleges today. "Coaching classes make a lot more sense to girls now," says Shirb[illegible]hnson, women's athletic director at UCLA, "because more of them are getting competitive experience in the younger grades."

It used to be that the only recognition women received for their athletic interests was half-price admission on Ladies' Day at the ball park. Now that Ladies' Day is illegal—it discriminates against men—more meaningful awards are being garnered by females in sports. Sports banquets are being held specifically in honor of female athletes. In two New Jersey high schools, girls were nominated for the country's scholar-athlete award—the first time any nominees were female. And Ada Steinmetz of La Salle College in Pennsylvania became the first female ever nominated for a Rhodes Scholarship. Since Steinmetz was a model student and participated in four varsity sports, the committee that nominated her felt that she did have the "qualities of manhood" Cecil Rhodes had wanted his scholars to have. (P.S She didn't get the scholarship. Things are good, but not that good.)

The feats of female athletes have begun to draw more press coverage, more TV time, and more and more spectators. In some cases administrators have been pleased just to see mothers and fathers turn out. Contrary to athletic lore, women *have* been able to draw paying crowds. Iowa girls' basketball is certainly the most famous example, but even in places where women's sports have bombed before, enthusiasm has been surprising. At the University of New Mexico, no more than 50 people used to turn out for a girls' gymnastic meet, but when athletic director Linda Estes charged money for a meet, 250 came to see it. Estes' explanation: If it's worth paying for, it must be worth seeing.

2. THE PROS LAG BEHIND

In the wide world of professional sports, where federal legislation has less impact, the plight of female athletes is much worse. There have been some improvements, particularly in the amount and quality of TV and press coverage for women pros. But if money is the measure of an athlete, then it is clear that the United States does not value its female sportspeople half as much as its males.

In golf, for example, where women have supposedly made great strides in the last few years, the increases in prize money for tournaments have been mainly a result of inflation, not of attempts at equality. In 1969, the men's top money winner (Frank Beard, $164,700) earned nearly four times as much as the women's top money winner (Carol Mann, $49,000). In 1972, top money winner Kathy Whitworth won $65,000 in 29 tournaments, but the same year Jack Nicklaus won five times that much ($320,000) in only 19 tournaments. In 1973, the ratio was back at the 1969 level of nearly four to one, with Kathy Whitworth earning $82,864 to Jack Nicklous' $308.362.

But the inequities in the socially acceptable, ladylike sports—golf and tennis—are insignificantly compared to those prevalent in the more masculine sports of track and bowling. Last winter, when the International Track Association (ITA) held its meeting at the Nassau Coliseum, the ads mentioned the male runners, but not the women. Yet three of the women were former Olympians. And although the women get the same $500 for placing first in an event, the women have no more than three events at each meet, while the men compete in 12. Which is why Wyomia Tyus, top female event and money winner, was ranked only sixth in earnings, behind five men.

"When the revolution in women's tennis began," explains pro bowler Paula Sperber, "the smaller sports never benefited from it." Paula, one of the top women on the pro bowling tour, says she sees no difference for women in her sport from the way things were five years ago.

One of the problems, Paula says, is that the men in bowling suffer from discrimination as well. "The sponsors put their money into rich people's sports like golf and tennis, even if the money doesn't do as much good there. The TV rating in golf, for example, aren't that good. Another sport might do as well, but they won't try." Although more people participate in and watch bowling contests, the people who watch golf and tennis make more money per capita than do bowling fans. So the sponsors, lured by good demographics, choose these sports; consequently, there's a lot less money around for all the athletes in the 'minor' sports or blue collar sports.

For example, the top male bowler won $86,000 in 1971. But golfer Jack Nicklaus won that much in three tournaments. What Nicklaus won in one tournament, however, probably tops what any woman bowler wins in a year. In 1971, Paula Sperber won only $16,000. Last year the top male bowler won $69,000; the top woman, $11,000. All-time male money winner, Dick Weber has accumulated $427,000 in winnings; Dottie Fothergill, all-time female money winner, has earned $47,900.

3. GOD BLESS YOU, TITLE IX

The explosion in female participation has sent shock waves through the oldest bastion of male supremacy—athletics, and the tremors have begun to crack ancient attitudes about women's place in sports.

During the 1920s, it seemed that women might be getting a chance at the gate as sports became a regular part of curriculums in women's colleges. But it was a false start. Prudes (who objected to the display of flesh) and proto-feminists (who thought women were being exploited for curiosity value) campaigned against women's intercollegiate athletics. Within a few years, women's teams had been reduced to 'clubs' and on rare occasions played the clubs of other schools—in ladylike sports, of course.

It has taken a long time for women's athletics to recover from this wholesale policy change, but women are beginning to demand a more important role in sports once more. What is giving clout to the demands this time is a group of federal laws that prohibit sex discrimination.

Some of these laws are ten years old, but it was 1972's Title IX that gave the revolution in women's sports its greatest thrust. Although the regulations that spell out just how far Title IX will reach into athletics were released only last June and are still not finalized, many school athletic departments found it wise to react to the mere threat of Title IX. Faced with the prospect of losing all federal monies because of their discriminatory policies—particularly blatant in athletics—many schools made the changes prior to the release of the regulations and often without the request or knowledge of female administrator at the school.

The Universtiy of Kansas raised its women's athletic budget from $9,000 to $121,000 for the current academic year. Last year's $9,000 budget made it necessary for female athletes to drive 24 hours straight to get to track meets or, if they arrived early, to sleep on wrestling mats the night before competition. The men, traveling in style at university expense, also received goodies like blazers and suitcases.

At the University of Washington, women's intercollegiate athletics used to be conducted on a club basis. Last year the club budget was $35,000 and came from student fees. This year, women's intercollegiates will take their place alongside men's, and will be supported by a budget of $200,000 as part of the department of intercollegiate athletics, a previously all-male unit. In addition, the University of Washington approved a $1.5 million expenditure to add a women's sports facility to Edmundson Pavilion, which is currently home for the men's teams.

At the University of California, Berkeley, the men's budget last year was $2.1 million, $540,000 of which came from student fees. The women's budget, all of which came from student fees, was $50,000, but that was 1,000% higher than the $5,000 they had the year before. This year the women's allocation from student fees will be $127,000, and the men's $350,000.

At Michigan State University, the women's budget jumped from $34,000 to $84,000 betwen the '72–'73 and '73–'74 academic years. Included in the new budget were services the men have always received: tutoring; medical treatment; a modern dressing room. Women administrators were also moved to the field house which has traditionally been restricted to men.

In high schools, the changes are less dramatic, but just as real:

At Campolindo High School in Moraga, California, last year's girls' budget was $200; the boys', $11,000. This year the boys' budget remains about the same, but the girls' has been raised to $1,200. In addition, this year, the girls' coaches are, for the first time, going to be paid as much as the boys' coaches.

But elsewhere the situation remains grim. We conducted an informal survey of colleges and high schools all over the country to see whether the money gap is narrowing. In schools, boys' budgets, on the average, were five times larger than girls'; in colleges men used 30 times as much money. And that's only an average. In some universities, the men's budget was 100 times as great as the women's in the '73–'74 academic year. At Pensacola High School in Florida, the boys got $42,168 for their athletic program; the girls got nothing.

Next year may not be much better. Many of the athletic directors we asked for current budget information were reluctant to talk. Some told us their budgets weren't complete, perhaps because of uncertainties about Title IX. Others said the information was confidential. From those budgets we could find, the reason for the secrecy becomes obvious.

At the University of South Alabama, men will operate on a budget of $200,000. Women will run their programs on $8,000.

At the University of Utah, women will have a $53,000 budget, a hefty increase from their $3,000 three years ago. The men's budget, however, which hasn't changed very much in that time, is $1.1 million.

In 1973, women received $8,600 for their athletic program at Memphis State University; the men's budget was $1.5 million. This year the women asked for $21,000, but were told to whittle that request to $15,550, 1% of the men's.

The athletic director at Duquesne University in Pittsburgh told us his budget was confidential. But another source informed us that Duquesne runs seven varsity sports for men and two—this past year it was only one—varsity teams for women.

Tucson High School will spend $17,000 on its boys, about $1,000 on its girls.

Shorewood School District of Milwaukee, Wisconsin, recently made the news when it allotted $20,000 to the boys' program and $4,000 to the girls. Despite the uproar by local mothers, the allocations stood.

Bake sales, candy sales and car washes are not requirements for men's teams, but female athletes frequently use such money fund-raisers to make enough money for their uniforms, equipment or travel. Fund-raising campaigns are not uncommon at Pacific 8 Universities or at Big Ten Schools, where millions of dollars are often spent on men's athletics. Last year, Arizona State University's female athletes held candy sales and raffles to get their national competitions. Although they received an emergency appropriation to get them through the season, they often had to travel to meets in their own cars, paying for their own mileage, while the men were flown at the university's expense. The men received $15 a day expenses, the women, $5.

"The situation is improving," says Phyllis Boring, a language professor at Rutgers University and a member of New Jersey Women's Equity Action League (WEAL).

"But I still hear stories about schools where they run late buses for the boys who stay late to play athletics. The girls stand in the yard and watch the boys leave in a half-empty bus, and then they hitchhike home because they're not allowed on the bus.

"I recently read an article about a girls' basketball team that was undefeated, but the article went on to say that they worked under a handicap: They couldn't use the gym on Tuesdays, Wednesdays or Fridays, and only after six on Mondays and Thursdays, when the boys were through."

At Ohio State, where the men operate on a six million dollar budget, female swimmers use the pool from 6:30 a.m. to 9 a.m., and again at dinnertime, when the men don't want it.

At Kansas State, $4.25 of each student's athletic fee goes toward a bond issue on the university stadium that no women, and only some of the men, can use.

The most blatant form of discrimination lies in coaching salaries. With few exceptions, coaches for female teams receive less money than coaches for male teams for the same or more hours of coaching. A survey of 75 Minnesota high school districts conducted by the Minnesota Federation of Teachers discovered that on the average girls' coaches were paid half as well as their male counterparts. In many schools, female phys ed teachers are asked to "volunteer" their coaching services while male coaches are paid for coaching the boys.

4. OUR OWN WORST ENEMIES

At the root of the problem is an attitude—entrenched as firmly in the minds of women as of men—that sports are more important for men than for women The attitude has been supported by a series of circular arguments that have allowed men to run rings around women athletes for years. Women are poorer athletes—even if inferior treatment has made them this way—and they don't deserve the kind of training or equipment given men. Women don't draw spectators—even if limited media coverage has stifled interest—so there's no reason to give them publicity or to let them run expensive programs which will just lose money. Women who play athletics are freaks—they have to be different in order to break the social taboo against women in sports.

While most young female athletes today know that these traditional attitudes are nonsense, many of them still feel a need to defend their positions. The stigma takes its largest toll in high school, where athletes are often informed by their friends that girls who play basketball don't get dates. Even those who play and play well are prompted to make statements to the press like: "There's no way you can play basketball and be feminine at the same time. I'm not going to go in and do a ballet lay-up, but when I'm off the court, I'm not a horse either."

Defensiveness about athletics doesn't come out of the blue. "It starts in third grade," says Joyce Wilson, a high school gymnast, "when the boys' and girls' phys ed classes are split up. That's when the boys take basketball and the girls take jump rope . . . It's not really the girls' fault if they're not interested in sports. It's the teachers' and the parents' attitude toward the students that's the problem."

There are some positive signs. Some grade schools have begun to integrate all their physical education classes and teach boys and girls the same sports. Increased TV coverage has made the female athlete more visible and more heroic. More and more women have begun to participate actively in sports, demonstrating that there's nothing unnatural about a female athlete.

Participation figures nationwide are encouraging. According to a survey by the National Federation of State High School Associations, participation by girls in interscholastic sports jumped 175% between 1971 and 1973. Particiaption by boys jumped only 3% in the same period. The number of girls participating in indoor and outdoor track and field increased from 62,000 to 186,000, a 200% increase in a two-year period. Participation in gymnastics doubled, from 17,000 to 35,000 girls; participation in girls' softball rose from 9,800 to 81,000.

Responding to the increased interest in sports, schools began fielding more teams for girls. The number of schools providing volleyball teams increased by 4,000 between 1971 and 1973. Three hundred and seventy three schools had softball teams in 1971; 4,251, in 1973. And the number of schools with girls' gymnastics teams rose from 1,000 to 2,100.

"Girls are interested in sports," says Carol Garinger, volleyball coach at a Seattle high school. "They get a chance to excel and to get the feeling of competition. They aren't concerned about the image of a girl in sports anymore."

Even more damaging to the position of women in athletics has been the attitude of female athletic directors themselves, who have witnessed the rapid development—and in their opinion, the deterioration—of men's athletics. Fearing that high pressure competition which has led to the buying and selling of male athletes, would also defile the women's programs, they have preferred to keep their teams at a more recreational level.

At Penn State, for example, it was the women, not the men, who presented the greatest obstacle toward improving the level of women's sports. "The athletic director and the dean and the president are all anxious to give more, but the women haven't asked for anything big," says Mary Jo Haverbeck, recently hired by Penn State to cover women's sports. "They didn't ask for scholarships [added this year at Penn State] and they didn't ask for uniforms; these new additions are being gently suggested to the women in charge."

Haverbeck said she had to persuade the female athletic directors to put numbers on the girls' uniforms so they could be recognized by audiences. "Women administrators have always fought against recognition for female athletes. They're afraid to make the same mistakes the men have made. But you have to take a chance. You can't do everything on the basis of one mistake."

Many of these women also believe that the girls at their schools do not warrant paying audiences or even higher budgets. Despite the successes of Iowa's girls' basketball teams, other administrators have not tried to sell their women's teams to audiences; and despite the huges inequities between men's and women's budgets, they have not asked for equal funding. "I really don't like to say it," says Barbara Hoepner, women's athletic director at the University of California, Berkeley, "but the girls are not good enough yet. They do not warrant the type of coaching that it would take to cost a million dollars."

Not all administrators feel this way, however, and some quickly recognize the fallacy in the girls-aren't-worth-it attitude. "Women are expected to be lousy," says Eleanor Nickerson, chairman of the girls' phys ed department at San Ramon High School in California. "How will they ever be able to justify a large investment if they are not given that investment in the first place?"

The female athletes have made it clear that they do not wish to be protected against the evils of competitive athletics. "I would welcome the problems the men have compared with the problems we have," says softball pitcher Charlotte Graham. "I just cannot get into feeling sorry for men. They have so many places to go and we have none."

5. ONWARD AND UPWARD

Recognizing that many of their attempts to help women have merely backfired, the old-guard administrators and phys ed teachers have begun to give in to the demands of female athletics. Their concessions have made the greatest difference in the revolution. They were the ones who changed policies about coed competition, about publicity and audiences, and about scholarships, bringing male and female athletics closer to parity.

Most male administrators have not been hostile to the revolution, until they're asked to part with a little cash. "Finances are the big problem," says Carol Gordon, president of AIAW. "Men's and women's athletics are part of a total picture of lack of funds for universities and colleges. If it were a rosy financial picture for men, there would be no problems. But they are being asked to give over their money to a program that hasn't been supported in the past. And they can't help but think that this will be detrimental to their programs."

"Sports as we know it will be extinct a decade from now," sports columnist Jack Enterline wrote in his Valentine's Day message to female athletes. "There just ain't no way that our communities can absorb the increased costs of expanding athletic programs, either in the recreational to school arenas. There is no way that a modern college can financially support a program referred to in the proposed legislation [Title IX]. And just in case you have any more grandiose ideas, there just ain't no way that expanded professional programs could gain enough support to be financially profitable."

So rather than compromise and cut their budgets, their programs, and their coaches' salaries, many men would prefer that women took their secondhand bats and went home, instead of standing up for what they are legally entitled to: equal opportunity in sports. It all goes back to the notions they have about a woman's place in athletics.

"The hell with football," writes syndicated columnist Furman Bisher, "Give me a good chef any day or a woman who can make gazpacho . . . and not be concerned about her pulled muscle or a charlie horse."

Panic in the male locker rooms centers around Title IX, which stands to cause the most changes in men's programs of any legislation thus far. Crying that the Title IX regulations have produced "a crisis in intercollegiate athletics," Walter Byers, president of the National Collegiate Athletic Association (NCAA), rallied his member institutions to support large-scale lobbying to have athletics eliminated entirely from the grasp of Title IX. When this attempt failed, the male athletic organizations got behind the amendment sponsored by Sen. John Tower, R.-Tex., and aimed at exempting all revenue-producing sports from Title IX. In June, the Tower Amendment was defeated in conference. The regulations were officially released for comment shortly after that, with no major concessions to the male athletic groups. But changes can still be made—the regulations won't be official for a few months—and rumors are that the NCAA hasn't given up.

It is tempting to take the easy way out, to say that the revolution in women's sports will not affect male athletics, that all that is required are "technical adjustments." But it just isn't true. Enterline and Byers are right. The sports establishment as we know it is in for a profound and rapid change.

And so what? Suppose that, when the crunch comes, individual athletic directors decide to take the money, not from the marginal intramural sports or minority, enthusiasms like fencing and wrestling, but from the big-time gaudy sports like football. Then perhaps the pressure would ease on coaches and administrators and 19-year-old boys who are supposed to fight like gladiators for dear old Most Attractive Offer U. Suppose that spectator sports declined and participant sports increased. It would be almost . . . revolutionary.

But even if that doesn't happen, change is still inevitable and just. The current situation, for all its improvements, remains intolerable. Budgets are still pitiful; equipment still inadequate; official attitudes still hostile. Women are not out to destroy the men's programs. They are out for an opportunity to participate in athletics in the style to which men are accustomed. The revolution has just begun.

Hang on. This could be fun.

Ms. KELLY. This article also points out that at the University of Arizona last year women held candy sales and bake sales to produce money for their educational programs.

I also think it is important to note that besides stressing equality between sexes we want to stress equality between sports.

I would like to give you a very brief, condensed version of the major differences between the men's and women's swim teams at the University of Minnesota during the 1973–74 school years.

Now, swimming is a sport that is participated in about equally by men and women. There are major differences in treatment between the men's and women's intercollegiate swim teams.

Men have the use of a six-lane pool during prime hours, 6 days a week. Women use a 4½-lane pool 4 days a week. On the fifth day they may use the six-lane pool between 5:30 and 7 p.m. when the men have finished.

These limitations make it extremely difficult for women who commute and/or work evenings to practice.

The men's pool is furnished with lane ropes, four pace clocks, penants—necessary for backstrokers—starting blocks, and three record boards. Women have none of this equipment which is essential for training.

Men are each given a locker. Thirty women—the entire team—share two lockers. Men are given a practice suit and a meet suit. Women are loaned a meet suit which must be returned at the end of the year and must buy one or two practice suits at $12 apiece.

Men are given a "T" shirt. Women must buy their own at $2.50. Men are given a travel bag. Women must buy their own at a cost between $7 and $20. Men are given $13 a day for food while traveling. Women are given $5.

Men are guaranteed their way paid to nationals if they place in the top three of a "Big Ten" event. Often if they place below that, their way is also paid.

During the year under question a woman placed first in a "Big Ten" event. She was given only food and hotel funds, so the women's swim team sold "T" shirts to raise $450 to send her and the coach to the national event.

Three qualified women swimmers stayed home.

Men are given awards such as leather jackets and class rings. Women if they qualify may pay $26 to have a team jacket.

The women's coach is paid less than the minimum wage while the men's swimming coach receives a far more sufficient salary. Men officials are given free parking on campus. Women officials are not.

[The full text of a complaint regarding these charges was submitted later by Ms. Kelly and follows:]

UNITED STATES NATIONAL STUDENT ASSOCIATION,
OFFICE OF THE PRESIDENT,
Washington, D.C. June 19, 1975.

Hon. JAMES O'HARA,
Chairman, Subcommittee on Postsecondary Education,
Rayburn Building, Washington, D.C.

Dear CONGRESSMAN O'HARA: Enclosed is a copy of the Title IX complaint filed by the University of Minnesota student government, May 16, 1974. It contains the list of the discrepancies in facilities between the men's and women's swim teams, which you requested. The information on the swim teams is located on Page 6. A more detailed list is located in Appendix B. The Appendices also outline in detail the differences as to facilities, equipment, travel benefits, coaching time, financial aid, recruiting, and salaries between the men's and the women's teams in track, tennis and gymnastics. Although the complaint is quite detailed, I think it's single most interesting point is the fact (located on page 5) that the $40,500 allocated for men's "study skills" (i.e. tutoring to keep male athletes academically eligible) is greater than the total amount given to the entire women's athletic program.

The history of the complaint itself is fairly interesting. It was filed not only because the student government was appalled by the treatment of women's intercollegiate athletics, but also because athletics seemed to be overtly symbolic of the sexism which often goes unnoticed on campus. The student government also felt that the University of Minnesota was typical of many institutions, and as such, the complaint would be a good test case.

There has yet to be even an on-sight investigation by OCR. However, enormous publicity accompanied the filing of the complaint and, as a result, the University established a special task force to deal with the matter. Also, the money allocated to the women's athletic program by the University has risen in the past year from $27,000 to $135,000. The student government is still far from satisfied, however and have filed suit against OCR for non-enforcement. A female golfer also filed her own Title IX complaint earlier this year.

I am happy that this particular case caught your attention. It is all too easy to abstract issues like Title IX and I think individual cases like this help to remind people of the human element which is so often forgotten.

If you would like more information on the Minnesota complaint the attorney for the student government at the University of Minnesota is Larry Leventhal. His address is 326 Midland Bank Building, Minneapolis, Minnesota, 55401. Telephone 612-336-5747.

I would like to thank you for giving the U.S. National Student Association the opportunity to testify on the Title IX regulations. This is an issue about which we are deeply concerned. If we can be of any further assistance, let us know.

For the Association,

KATHY KELLY,
President.

TITLE IX COMPLAINT FILED BY THE STUDENT GOVERNMENT OF THE UNIVERSITY OF MINNESOTA

K. It is common practice for participants in women's varsity sports to pay for their own uniforms and travel. This is not the case for men athletes.

L. The discrimination as set forth above permeates all University sports. Examples of such discrimination against women athletes are specified below for swimming, track, tennis and gymnastics:

1. Swimming: There are major differences in treatment between the men's and women's intercollegiate swim teams. Men have the use of a six-lane pool during prime hours six days a week; women use a 4½ lane pool four days a week; on the fifth day they may use the six-lane pool between 5:30-7:00 p.m. when the men have finished. These limitations make it extremely difficult for women who commute and/or work evenings to practice. The men's pool is furnished with lane rope, four pace clocks, penants (necessary for backstrokers), starting blocks, and three record boards. Women have none of this equipment which is essential for training. Men are each given a locker, thirty women (the entire team) share two lockers. Men are given a practice suit and a meet suit; women are loaned a meet suit which must be returned at the end of the year and must buy one of two practice suits at $12 apiece. Men are given a T-shirt; women must buy their own at $2.50. Men are given a travel bag; women must buy their own at a cost between $7.00-$20.00. Men are given $13 a day for food while traveling, women are given $5.00. Men are guaranteed their way paid to the Nationals if they place in the top three of a Big Ten event. Often if they place below that, their way is also paid. During the current year a woman placed first in a Big Ten event; she was given only food and hotel funds, so the Women's Swim Team sold T-shirts to raise $450 to send her and the coach to the national event. Three qualified women swimmers stayed home. Men are given awards such as letter jackets and class rings; women if they qualify may pay $26 to have a team jacket. The women's coach is paid less than the minimum wage for coaching while the men's swimming coach receives a far more sufficient salary. Men officials are given free parking on campus. Women officials are not. (For further detailed comparison see Appendix B.)

2. Track: Men have exclusive use of the Field House at Cooke Hall during 2:30 to 4:30 p.m. five days a week. The women's track team utilizes the Cooke Hall facilities during this period only with the permission of the men's track coach. Men are given the use of sweat suits, socks, shoes, T-shirts and shorts for practice as well as a warm-up uniform for meets. Women must furnish their own articles of attire for practice. They are, however, given a uniform to utilize for meets which must be returned. Track shoes, which can be checked out by women for use in meets, are not for practice. The men's track team owns one javelin, two indoor and two outdoor shots, four discus and five stopwatches. The women's track team owns none of its own equipment. They can, however, check out certain equipment as available from the Department of Physical Education for limited time periods. Women track participants practice at Cooke Hall but equipment check-out is at the Norris Gymnasium. Men have a budget for travel to out-of-town meets; women have very limited finances for this purpose.

Financial aid is available for track participants who are male but not for females. Outstanding male track participants are given various awards such as jackets and blankets while women are given no such awards. There is a paid coach and two part-time assistant coaches assigned to men's track. Women's track has the services of one part-time coach for spring quarter only. (For further comparison see Appendix C.)

3. Tennis: Men are given greater use of indoor tennis facilities than are women tennis participants. Men are given warm-up jackets and pants, shorts and shirts for practices and games and three pairs of shoes each. Women receive only windbreakers. Rackets are supplied courtesy of racket manufacturers for men but not for women. A paid coach supervises tennis for men. There is no paid coach for women. However, in 1973–74 $300 is being paid to the assistant tennis coach for women while the head coach engages in coaching as an overload activity without additional pay. (See Appendix D.)

4. Gymnastics: Unlike the men's gymnastic team, the participants in women's gymnastics do not have a permanent area in which to work. They must set up and take down each day all equipment. This consumes at least one-half hour of practice time. The men's equipment is always set up for use. The male participants have work-out uniforms provided and cleaned for them together with shoes, handguards and tape. Women must buy their own leotards for competition. Tape, which is essential in gymnastics, is normally provided to both men and women, although the women have had trouble getting sufficient tape this year and have often been forced to use leftovers from other teams. The men's gymnastic team has a floor exercise mat; the women's team does not but borrows and utilizes the men's mat when it is not otherwise in use. While men gymnastic competitors usually fly—expenses paid—to out-of-state meets, the women must drive to such meets since no funds are available for airline flights. Men receive $13 per day out-of-state allowance per competitor; women receive $5 per day out-of-state allowance per competitor. Two full scholarships are provided for male participants in gymnastics; no such scholarships are provided for women. Men get credit for competing in varsity gymnastics; no such credit is available for women participants. (For further comparison, see Appendix E.)

5. Other Sports: Other sports follow a similar pattern. The sports available to women at the University of Minnesota in addition to track, tennis, swimming and gymnastics include basketball, field hockey, golf, softball and volleyball. Women are not currently participating in other sports on a varsity basis.

V. UNIVERSITY POLICIES IGNORED

A. Through their discriminatory actions, respondents have ignored their own applicable policies. While purporting to provide equal treatment of all persons regardless of sex and specifically purporting to provide equal athletic opportunities, respondents have, in fact, as set forth above, engaged in a pattern of discrimination applied on the basis of sex. In doing so, they are in violation of their own University policies and guidelines:

1. The Board of Regents policy on human rights provides:

"The Board of Regents has committed itself and the University of Minnesota to the policy that there shall be no discrimination in the treatment of persons because of race, creed, color, sex or national origin. This is a guiding policy in the admission of students in all colleges and in their academic pursuits. It is also to be a governing principle in University-owned and University-approved housing, in food services, student unions, extracurricular activities, and all other student and staff services. This policy must also be adhered to in the employment of students either by the University or by outsiders through the University and in the employment of faculty and civil service staff."

2. The policy statement of the Assembly Committee on Intercollegiate Athletics was approved by the University Senate on December 10, 1959. The policy statement specifically provides that participation in intercollegiate athletics shall be available to qualified students and that all qualified students shall be given every opportunity to develop their athletic aptitudes and skills. It further provides that financial assistance and educational opportunities for such athletics will be available. The applicability of this statement and policy to both men's athletics and women's athletics was affirmed in 1973 by the Assembly Committee on Intercollegiate Athletics. (See Appendix F.)

3. The University of Minnesota's Assembly Committee on Intercollegiate Athletics adopted the following objectives of Intercollegiate Athletics for women:

1. To afford the highly skilled woman student with the opportunity to attain the highest level of performance of which she is capable.

2. To offer a well-rounded program of high quality in competitive sports to meet the diverse needs of woman athletics, e.g., aquatics, gymnastics, individual and team sports.

3. To provide the opportunity for participants to become physically conditioned and trained for competition and to experience the value derived from such competition.

4. To provide competitive experiences for women with athletic prowess (including physical education majors and other students who wish to pursue sport as a profession).

5. To provide opportunities for participation in highly organized contests governed by acceptable standards and to learn to engage in and to conduct such events appropriately."

The present programs do not meet these objectives.

VI. ADVERSE EFFECTS OF UNIVERSITY DISCRIMINATORY ATHLETIC POLICY

A. Women students are not provided with constructive role models in areas related to athletic achievement, thus contributing to a lack of motivation and self-esteem.

B. Through its lack of attention to women's athletic programs, respondents bear a major responsibility for the neglect of such programs in elementary and secondary schools throughout Minnesota.

C. Through failure to adequately train women in areas of coaching, athletic training and athletic management, respondents have contributed to a statewide shortage of women available to teach, train and coach athletics in schools, institutions, community centers, church groups, and community recreational programs.

D. Such discrimination by the University of Minnesota has created a community atmosphere wherein the press and other media direct little or no attention to women's athletics.

E. The University of Minnesota, as the third largest single campus student body in the United States, plays a pivotal role in setting national athletic trends and examples.

F. Through its pattern of discrimination respondents fail to provide an opportunity for women students to pursue physical conditioning and training and to derive the various benefits available from meaningful athletic programs.

G. This pattern of discrimination tends to perpetuate various misconceptions and stereotypes about women concerning their abilities, their physical capacities and their aptitudes.

VII. UNIVERSITY OF MINNESOTA AS RECIPIENT OF FEDERAL FUNDS

Ahe University of Minnesota is a recipient of federal funding in areas relating to research, facilities, scholarship assistance, academic development, personnel and general supportive services. Such aid in recent years has totaled over $50 million dollars each year.

VIII. RELIEF DEMANDED

The following appropriate relief is herein demanded:

A. Immediate cessation of all federal funding directed to the University of Minnesota, subject to reinstatement upon:

1. The eradication of all discriminatory athletic practices; or
2. Substantial progress toward and a commitment to such eradication and adoption by respondents of an affirmative action program as set out in Section IX of this complaint.

B. On-site hearings and inspection at the Twin Cities Campus of the University of Minnesota by appointed officials of the Office of Civil Rights.

C. Availability of an official of the Office of Civil Rights or Equal Employment Opportunities Commission for at least three days at the Twin Cities Campus of the University of Minnesota, said visit to be publicly announced at least one week in advance, for the purpose of taking complaints and statements from individuals who allege sex discrimination in the University athletic programs.

D. Declaration that the University of Minnesota has been guilty of unlawful sex discrimination.

E. Referral of the matters contained herein to the Department of Justice for the bringing of an appropriate civil and/or criminal action against these respondents if prompt compliance is not forthcoming.

F. Such other and further relief as shall serve the interests of justice.

IX. AFFIRMATIVE ACTION PROGRAM

The Affirmative Action Program should include but not be limited to:

A. An immediate end to all sexually discriminatory rules, regulations and practices.

B. A commitment whereby all funds directed to athletic programs by or through the University, together with all profits derived by revenue-producing sports, shall be distributed respectively to non-revenue-producing men's athletics and non-revenue-producing women's athletics in proportion to the sex ratio of the student body. For the purposes of this section, a men's women's, and coeducational sport which derives income in excess of its expenses shall be considered a revenue-producing sport, and a non-revenue-producing sport shall be one which does not produce such profit. (The only current revenue-producing sports are men's football and men's basketball.)

C. Achievement of equality of opportunity for women to participate in all varsity athletics:

1. On a team or squad consisting of female participants which is funded and equipped on a basis of an equivalent percentage of male/female student enrollment by total athletic budget, and for which equivalent facilities and coaching talent are made available.

D. Development of a meaningful program of financial assistance and scholarships for prospective women athletes, including the utilization of Williams Fund money.

E. Achievement of a balanced athletic program which will provide students of each sex an equal opportunity to participate.

F. Provision for usage of existing athletic or supportive facilities at the University by women students on a basis equivalent to usage by men students.

G. Staffing of paid positions within the respective field of women's athletics, salaried at a level consistent with the principle of equal pay for equal work.

H. Provision for compensatory payments to individual staff members in the women's athletic program to adjust for insufficient or non-existent salaries in the past.

I. Placement in an escrow account of all funds derived by the University of Minnesota from ticket sales and gate admissions for any and all athletic events with disbursement made only in conformity with this Affirmative Action Program.

J. Suspension, until the above requirements are met, of the collection from women students at the University of Minnesota of that portion of student fees and/or tuition expenses as would otherwise be directed to athletic programs and/or facilities.

K. Provision for payment of damages to individual students who have been injured through the University's discriminatory practices in athletics on the basis of sex, to be accomplished through the creation of a fund for this purpose which shall be administered and distributed by the Twin Cities Student Assembly.

Respectfully submitted,

LARRY B. LEVENTHAL,
Attorney for Complainants.

APPENDIX A

UNDERGRADUATE MALE-FEMALE ENROLLMENT, FALL QUARTER, 1973

College	Men	Women	Total
Agriculture	1,013	295	1,308
Biological sciences	336	130	466
Business administration	1,179	147	1,326
Dental hygiene	3	163	166
Education	894	1,639	2,533
Forestry	477	47	524
General college	1,488	1,017	2,505
Home economics	40	1,213	1,253
Liberal arts	8,569	7,588	16,157
Medical technology	10	119	129
Mortuary science	80	4	84
Nursing	20	361	381
Occupational therapy	4	58	62
Pharmacy	272	108	380
Physical therapy	13	45	58
Public health	162	91	253
Technology	3,423	239	3,662
University college	157	153	310
Total	18,140	13,417	31,557

Note: Percentage of women students: 42.52.

APPENDIX B

DIFFERENCES BETWEEN MEN'S AND WOMEN'S SWIMMING TEAMS AT THE U OF M

FACILITIES

Men have two 6 lane pools prime hours 6 days a week, as compared to the women's one pool 4½ lanes wide 4 days a week and on the fifth day the large pool when the men are done. 5:30–7:00 pm which makes it very hard for the women who commute and work in the evenings. Men's pool has lane ropes, 4 pace clocks, pennants for backstrokers, starting blocks and 3 record boards. Women have NONE of these which are essential for training. Men are each given a locker and towel service. Women students share two lockers for the entire team, which was thirty this year. The pool at Norris does not have sufficient hair dryers.

UNIFORMS

Men are given two swim suits, one a practice suit and the other a meet suit, which they keep. The women have the use of one meet suit and return it as soon as the season is over. The women usually have to buy one or two other suits to wear at practice and meets. They cost $12.00 each. Men are given a very nice T-shirt while the women buy their own for $2.50. Men are given a travel bag to use while the women have none. They buy their own at a cost of $7.00–$20.00. Men are usually given deck shoes to prevent slipping on the deck as well as for warmth while the women are given none. (This year the men did not receive them.)

TRAVEL BENEFITS

Men are given $13.00 a day for food while the women are given $5.00 a day. Men have a much bigger budget to schedule out of town meets. Men have their way paid to Nationals if they place in the top 3 at Big Ten Championships. This year one male swimmer placed second and another one placed sixth; both had their way paid to Long Beach, Calif. for the Nationals. One woman won an event at Big Ten and placed second in another, a different woman placed 7th. The women were only allotted food and hotel funds which were not enough for all those who qualified so three women stayed home and the one woman and the coach raised the money to make up the $450.00 difference. Men fly to meets in Michigan while the women do not go at all because of a limited budget.

FINANCIAL AID

Men are given athletic scholarships, while women students have none. Those men on tenders are also given tickets to sports events, women receive none.

OTHER AWARDS

Outstanding men athletes are given letter jackets, class rings, etc. Women are given nothing like this so members of this year's team have each paid (only those who could afford to do so; 10 girls) $26.00 to have a team jacket.

COACHES SALARY

The men's coach is paid considerably more than the women's coach. (Who does not make even a minimum wage.)

OFFICIALS BENEFITS

The men are given $45.00 to run a meet while the women are given $30.00 to pay for the same duties. The men's officials are given a parking space on campus while this same privilege is not awarded to women's officials.

APPENDIX C

DIFFERENCES BETWEEN THE MEN'S AND WOMEN'S INDOOR TRACK TEAM AT THE U OF M

FACILITIES

Men have the exclusive use of the field house track adjacent to Cooke Hall during 2:30–4:30 pm, 5 days a week. The women have no exclusively scheduled track time but the men's coach, has consented to letting the women's track team use the track between 2:30 and 4:30 pm same as the men.

UNIFORMS

Men are given the use of sweatsuits, socks, shoes, t-shirts, and shorts for practice. They are given a special University warm-up for meets. All of these articles of clothing are to be returned. Women must furnish their own sweatsuits, socks, shoes, and shorts and shirts for practice. They are given a special uniform (shorts, shirt and warm-up) for meets. This uniform must be returned. They can check out track shoes for competition only. These can be worn only for meets, not for practice.

EQUIPMENT

The men's intercollegiate team owns 1 javelin, 2 indoor and 2 outdoor shots, 4 discus and 5 stop watches. The women own none of their own equipment. They have to check it out from the Dept. of Physical Ed. It can be checked out for limited time periods. No overnight checkouts except on weekends. The women had practice at Cooke and the equipment checkout was at Norris.

TRAVEL BENEFITS

Men have a large enough budget to schedule out of town meets. Women have a very limited budget which does not provide for many meets either home or out of town.

FINANCIAL AID

Athletic scholarships are available to men and not to women athletes.

OTHER AWARDS

Men athletes are awarded letter jackets; women are not.

COACHING

Men have a paid coach and two paid part time assistant coaches. Women have a part time coach for spring quarter only.

APPENDIX D

INTERCOLLEGIATE TENNIS COMPARISON, 1973–74

Items supplied by the University of Minnesota	Women	Men
Equipment:		
Balls	Yes	Yes.
Rackets	No	Yes.[1]
Strings	No	No.
Clothes:		
Outer	Windbreakers	Warm-up jackets and pants.
Inner	No	Shorts and shirts for practices and games.
Shoes	No	3 pairs per player.
Facilities:		
Indoor:		
Fall	8–10 a.m., MF; 9–11 a.m. Th (6 hr)	3–5 p.m., MTWThF (10 hr).
Winter	Same—6 hr	Same—10 hr.
Spring	1–3 p.m., MWF; 4–6 p.m., TTh (10 hr)	3–5 p.m., MWF; 2–4 p.m., TTh (10 hr).
Outdoor: Spring	2–4 p.m., MWF; 3–5 p.m., TTh (10 hr); 4th Street courts.[2]	3–5 p.m., M–F (10 hr); Bierman courts.[3]
Coach's salaries	([3])	$4,000.

[1] Rackets are supplied courtesy of racket manufacturers (Wilson and Davis).

[2] The conditions of the courts vary considerably—the 4th Street courts are in need of resurfacing.

[3] In 1973–74 $300 was paid to the assistant coach in the spring. The head coach coaches on an overload basis.

WOMEN'S GYMNASTIC TEAM

Uniforms and equipment

1. Women had to buy their own leotards for competition because the University didn't have enough for a team.
2. The men have workout uniforms provided and cleaned for them.
3. Men have shoes, hand guards and tapes provided for them. Women had a lot of trouble getting sufficient tape this year. Tape is essential in gymnastics. Often they had to use the leftovers from other teams and it wasn't the right kind.
4. Men have a floor exercise mat—women can use only when the men aren't using it.
5. Women need tape player for routines.

Facilities

1. Women don't have a permanent area to work in. They must set up and take down *all* the equipment every day, which takes at least ½ hour of practice time. Men's equipment is always set up for use.
2. Women have no open workout time. Men can workout in their area whenever it is available without classes and on weekends.
3. Women have insufficient training facilities for athletic injuries. One part time women trainer for all the women's teams. Men get use of all the training facilities at bierman. Whirlpools, etc. and the women are scheduled around the men's teams.

Transportation

1. Women travel by University car. A University employee must drive and only two women on the team were employed by the University. Every away meet they had to always drive then compete.
2. There is a $13/day out of state allowance per male competitor. We had $5/day for our regional meet in Missouri.

3. Men fly to Chicago and Indiana, etc., but women had to drive to Springfield, Missouri—crammed into two cars.

Recruiting

1. Women have no funds for recruiting—men send out hundreds of letters, etc. to local talent.
2. Men have two full scholarships—women have none.
3. Men get credit for competing—1 credit freshman year; 1 credit varsity.

Publicity—Very psychologically damaging to the team

1. Women not included in "Sports Shorts".
2. No advance publicity or results.
3. State results (took 2nd in state) not published until we had *left* for regionals.
4. Articles always smaller than men's—no pictures.

G. The women's athletic budget for 1973–74 was originally set at $27,988. The donation of the proceeds of a professional athletic contest raised the budget to $34,970. The total budget for all men's sports is $2,253,470, of which $1,426,370 is directed to football and basketball, and $826,600 is directed toward non-revenue sports.

H. The men's athletic budget includes $40,500 for "study skills." This category covers the tutoring of athletes so that they will stay academically eligible. The expenditure for this purpose is greater than the total amount of finances directed to all women's athletic programs for all purposes. No expenditures are provided for women's "study skills" or tutoring.

I. The actual expenditures for various classifications of women's and men's intercollegiate athletics for 1972–73 are printed below. During this period expenditures relating to women's athletics constituted less than 1% of the funds directed to men's athletics.

UNIVERSITY OF MINNESOTA

Expenditures by class	Men's actual, 1972-73	Women's actual, 1972-73
Salaries and wages	$741,405	$5,907.50
Team travel	244,764	10,000.00
Staff benefits	91,621	0
Student aid (Williams scholarships)	82,090	0
Student aid (other)	308,566	0
Public relations and recruiting	118,941	0
Buildings and fields	146,262	0
Other expenses (laundry, team equipment and supplies, medical expenses, insurance, etc.)	475,679	0
Total	2,209,328	15,907.50

J. No budget for administration had been provided for women athletics through 1972–73. Currently, there is a two-thirds-time secretary assigned to the women's athletic program. This lack of administrative resources severely affects coordination and planning. The men's athletic department has a paid administrative staff.

APPENDIX F

POLICY OF INTERCOLLEGIATE ATHLETICS AS APPROVED BY THE UNIVERSITY SENATE ON DECEMBER 10, 1959

"Long experience at the University of Minnesota has amply demonstrated that intercollegiate athletics are a challenging and valuable part of the total enterprise of the University. Through the years intercollegiate athletics have provided thousands of young men opportunities to develop their physical skills, to experience the values of dedication to a purpose, of perserverance and of team effort for the attainment of a common goal. Participation in intercollegiate athletics has enriched the educational experience and the later lives of these men.

In a larger sphere, intercollegiate athletics have served as a focal point and desirable bond of common interest among students, faculty, alumni, and friends of the University, and the citizen-constituency of the institution.

Deeply conscious of these tangible values, the University will continue its policy of whole-hearted support of a program of intercollegiate athletics, which, through excellence in all phases, will maintain the high standards which Minnesota teams have reached in the past.

The University welcomes opportunities for cooperation with other educational institutions and high schools in the development of sound programs of sports for the young people of this state.

To integrate the role of intercollegiate athletics with other activities and purposes of the University and of its student body, the University desires to maintain a strong and successful program of intercollegiate athletics in accord with these principles:

1. Qualified students are encouraged to participate in the program of intercollegiate athletics.

2. To protect the collegiate character of athletic activities, participation in intercollegiate athletics is restricted to regularly enrolled, bona-fide students who meet the prescribed standards of admission to and continuation in established curricula and who are pursuing a regular academic program of study. In keeping with this concept, the academic work of the student takes precedence over athletic activity.

3. Within the framework of their academic obligations and over-all educational objectives as bona-fide students, our student-athletes will be given every opportunity to develop their athletic aptitudes and skills and their good sportsmanship in competition, under the guidance of a competent staff in the Dept. of Physical Education and Athletics for Men, and through maintenance and improvement of its facilities.

4. The University will continue to provide, as athletic income and other funds permit, and as authorized by the Big Ten Conference, financial assistance for the education of students who can contribute to the success of our teams and at the same time meet the prescribed scholastic standards.

5. Minnesota teams have always been truly representative of the student body, the University and the State of Minnesota. While the University welcomes all qualified students who wish to avail themselves of the educational opportunities offered by Minnesota, it is its policy to seek the enrollment of student-athletes primarily from those areas which supply the majority of the student body.

6. In scheduling intercollegiate competition, the University is interested in a reasonable number of in-season contests, primarily with members of the Big Ten Conference and other associations to which it belongs, or which adhere to similar standards of athletic conduct and policy.

7. The University reaffirms adherence to the principle of faculty control over intercollegiate athletic policy; it will continue to work, within the Big Ten Conference and the National Collegiate Athletic Association, for the development of sound rules for conduct of athletics which conforms to the dignity and mission of a university, with the requirement that its athletic staff and its students will adhere strictly to both the letter and the spirit of these rules to the end that Minnesota athletics may exemplify the integrity of the University and deserve the confidence and whole-hearted support of all concerned."

Twin Cities Student Assembly as the Student Governmental Body of the Twin Cities Campus of the University of Minnesota, and on Behalf of all Students Upon the Twin Cities Campus of the University of Minnesota, complainant

v.

University of Minnesota Board of Regents: Elmer L. Andersen, Chairman, Fred A. Cina, Kathryn Vander Kooi, David Utz, Lauris Kreink, Wenda Moore, L. J. Lee, Lester A. Malkerson, George A. Rauenhorst, Neil C. Sherburne, Loanne R. Thrane, John A. Yngve, Regents, and University of Minnesota President Malcolm Moos; Vice President for Finance, Planning and Operations James F. Brinkerhoff; Vice President for Student Affairs Paul H. Cashman; Vice President for Administration Stanley B. Kegler; Acting Vice President for Academic Administration Harold Chase; Vice President for State and Federal Relations Stanley J. Wenberg; and Athletic Director Paul Giel, respondents

I. JURISDICTION

A. The action herein is brought under

1. Title IX of the Education Amendments of 1972, P.L. 92–318, 92nd Cong., S. 653, June 23, 1972, prohibiting discrimination on the basis of sex in all federally-assisted education programs.

2. The Civil Rights Act of 1962 as amended, 42 U.S.C. 2000.

3. Executive Order N. 11246 signed September 24, 1965, amended to add sex as a prohibitive basis of discrimination on October 13, 1968, with additional amendments October 13, 1967 and August 8, 1969 prohibiting discrimination in employment, hiring, salaries, etc. on the basis of sex and/or other prohibited criteria in government employment and by government contractors and sub-contractors.

4. The Fifth Amendment to the United States Constitution guaranteeing due process of the laws.

5. The Fourteenth Amendment to the United States Constitution guaranteeing due process and equal protection of the laws.

6. 42 U.S.C. 1983, providing that "all persons under color . . . custom, or usage of any state or territory . . . who deprive another of civil rights shall be liable to the party injured."

B. Enforcement Responsibility: The Office of Civil Rights of the Department of Health, Education and Welfare has enforcement responsibility relative to the above.

II. PARTIES

A. Complainant

The Twin Cities Student Assembly brings the complaint herein on its own behalf as the student governmental body of the Twin Cities Campus of the University of Minnesota and on behalf of all students upon said campus. The Twin Cities Student Assembly Constitutes the representative student government for the Twin Cities Campus of the University of Minnesota. Said Twin Cities Student Assembly serves as the governmental arm of the student body as well as the student membership upon the University Senate and has succeeded to those functions previously engaged in on behalf of the student body by the Minnesota Student Association. The Twin Cities Student Assembly is recognized by the University of Minnesota Board of Regents as the student governmental body.

Kathy Kelly is a former student body President of the Twin Cities Campus of the University of Minnesota (President of the Minnesota Student Association 1973–74). She is a woman student at the University of Minnesota and is personally adversely affected by the discriminatory practices on the basis of sex by the University of Minnesota relative to athletics.

The current full-time student enrollment at the University of Minnesota is approximately 40,000, each of whom is a member of the student governmental system of the University of Minnesota by virtue of fee-paying status. Women constitute 42.52% of the undergraduate student body. (See Appendix A for breakdown of enrollment.)

B. Respondents

Respondents are the University of Minnesota as an institution and each of the regents thereof named in their individual capacities. Said regents under authority specified by the Constitution of the State of Minnesota constitute the governing body of the University of Minnesota and are ultimately responsible for the discriminatory practices and omissions set forth herein. The University of Minnesota as a public institution of higher education is specifically included in and not exempt from the operation of the authority cited in Section I above. Additional respondents are the President and Vice Presidents and the athletic director of the University of Minnesota.

III. PATTERNS OF DISCRIMINATION

A large-scale pattern of invidious discrimination exists against women students at the University of Minnesota throughout the University's various athletic programs. Such discrimination permeates the allotments of funding, equipment, facilities, space, time, recruitment, scholarships, financial aid, and staff for the respective male and female athletic programs.

This pattern of sex discrimination existing in athletics is part of an overall pattern of discrimination against women at the University of Minnesota. Examples of this overall pattern of discrimination can be found in the composition of the faculty, salaries and promotional limitation of women faculty members, and the composition and salaries within the University of Minnesota Civil Service.

According to a recent study, women made up only 5.5% of the faculty teaching co-educational classes within the College of Liberal Arts, the only college in which women are represented to any great extent other than in traditional "women's fields", i.e., Nursing, Home Economics. This was less than one-third the national percentage of women earning Ph.D.'s in the various disciplines of the College of Liberal Arts from 1960 to 1970.

Available statistics show that on the average, the University of Minnesota pays women susbtantially less than men holding the same academic positions. Faculty appointments for October 1972 through May 1973 as listed on the Regents' dockets included:

Male	9 professors, 15 associate professors, 32 "other" appointments.
Female	1 professor, 1 associate professor, 3 "other" appointments.
Civil service employees	23 percent of males earn more than $1,000 per month, 3 percent of females earn more than $1,000 per month, 10 percent of females earn less than $400 per month, 2 percent of males earn less than $500 per month—total civil service employees: 66 percent female, 34 percent male.

IV. SPECIFIC DISCRIMINATION AGAINST WOMEN IN ATHLETICS

A. Athletic practice and training facilities for women at the University of Minnesota are inadequate in space, equipment and quality. Facilities available to both men and women are frequently available to women only during inconvenient hours and for short periods. Examples:

1. Bierman Athletic Field Building: Although 90% of the cost of the Bierman Building is being paid for by student fees (despite the fact that a 1973 Student Life Studies Poll showed that 74% of the University students were opposed to the mandatory fee for this purpose), women, for the most part have minimal use of the building and such use is confined to the gymnasium, a commons room, a classroom and a small locker room. The only locker room for women is designed primarily to service outdoor activities and is grossly inadequate. Both of the building's saunas are reserved for males only. Men athletes, staff and officials have a total of eight separate locker rooms in the Bierman Building while women athletes and staff share one very small locker room.

2. Locker Facilities: The number of locker facilities for men students at Cooke Hall and the Bierman Building total 3,070, while the total number of lockers for women is only 504. Thus, women have only 14% of the locker facilities at these locations. The women's locker facilities in general are considerably smaller than the locker facilities available for men.

B. There is no financial assistance program to aid women participating in athletics at the University of Minnesota. During 1972–73 the Williams Scholarship program provided $82,090 to assist male participants in athletics. Williams Scholarships were directed exclusively to males in the amount of $95,000 during 1973–74. No Williams Scholarship money is directed to women. Other student athletic aid to men in 1972–73 totaled $308,566 and during 1973–74 is estimated at $355,000. During neither period were any funds in the form of scholarship monies or financial assistance directed to female atheltic participants.

C. There are no full-time coaches assigned to women's athletics. All coaching is done by teaching assistants and part-time instructors paid on an hourly basis, and by unpaid volunteers from the School of Physical Education. The sporadic coaching availability together with a high turnover of coaches makes a cohesive program impossible. By comparison, in men's sports there are the equivalent of 23.3 full-time coaching positions.

D. The budget for trainers is disproportionate, with $35,000 directed to trainers of male athletes while only $1200 is spent on trainers assigned to women's athletics. Three well-equipped training facilities are available for men. Only one small training facility is available for usage by women.

E. The amount of $14,200 is budgeted for women's athletics for use in 1973–74 covering total expenditures in the categories of equipment, supplies, food and lodging, entry fees, uniforms and travel. In contrast, $252,015 is budgeted for travel alone for men's athletics for 1973–74.

F. There is no program of active recruiting for women's athletics and no money is allowed for such recruiting. In contrast, a rather extensive recruiting program for men's athletics exists. Further, there is only negligible public information and publicity provided by the University for women's athletic programs,

while it directs considerable attention to the provisions of public information and publicity relating to men's athletic programs.

Ms. KELLY. Also we would like to cover a few of the arguments about whether or not athletic programs are supported by Federal funds. We think there is legal precedent saying that although a specific program may not receive directly Federal funds it cannot be considered in isolation from other programs in a college or university which do.

Also congressional intent, I believe, was clearly that athletics be included in title IX. That was stated in the Higher Education Amendment of 1974.

There is also again the precedent of title VI. Under title VI the courts have consistently ruled that athletics are an integral part of a given institution's educational program. Representative Chisholm made this point very well, that if athletic programs benefit indirectly from Federal funds which are given to a college or university for other programs, that frees up more money that they can give to athletics.

Mr. O'HARA. Thank you very much for your very pertinent testimony.

I notice that you discovered after you had been admitted to the University of Minnesota that at the time you were admitted different standards were used for admission of men and women to the university.

Ms. KELLY. That has since been changed.

Mr. O'HARA. Are you aware of any cases in which institutions or perhaps graduate schools, law schools, medical schools use different standards today?

Ms. KELLY. I am not aware of any specific instances although I do believe that even though there may not be officially stated quotas there are often unofficial quotas as far as female enrollment.

This pertains to law and medical schools especially but I can't think of any specific examples.

Mr. O'HARA. Would you be opposed to the use of different standards for admission of men and women regardless of which was the preferred sex?

Ms. KELLY. Yes, I think I would be because the fact is that most women who do apply for professional or graduate schools are more qualified than men who apply simply because to make it there they have always had to be better. I don't think you have to lower your standard to accept women because usually their grades are better than the men who apply.

Mr. O'HARA. Is it your understanding that the regulations as written would prohibit the use of unequal standards even if they were part of an affirmative action program designed to overcome the effects of past discrimination?

Ms. KELLY. The way I see the regulations they do allow this sort of positive steps to make things more equitable. I agree with that.

Mr. O'HARA. As you read it would they permit the use of lower standards for instance for women?

Ms. KELLY. I don't think lower standards, no.

Mr. O'HARA. You would favor that as part of an affirmative action program?

Ms. KELLY. The positive steps I see that are most important are recruitment, telling women they are able to come to a law school or medical school.

Mr. O'HARA. Do you think the regulations and understanding of them would be assisted if it were clearly set forth that different standards are not acceptable based on sex, either in general or as part of an affirmative action program?

Ms. KELLY. I personally am not in favor of different standards.

Mr. O'HARA. Do you think the regulations would be clarified and acceptance of them improved if that was spelled out?

Ms. KELLY. Perhaps; but that once again is a personal opinion.

Mr. THOMPSON. Will the gentleman yield?

Mr. O'HARA. Yes.

Mr. THOMPSON. Thank you, because I have to go on for another appointment. I simply want to congratulate these two women on their testimony and to say that I find myself in sympathy and in agreement, particularly with respect to the admissions standards.

I do not think that they have to be different for men and women. If they are absolutely equal then the competition is open and those best qualified will and should be admitted.

Mr. O'HARA. I certainly agree with my friend from New Jersey on that. I think it might be better if that was spelled out.

Mr. THOMPSON. I do too.

Mr. O'HARA. I yield to the gentleman from Minnesota.

Mr. QUIE. It is good to see you, Ms. Kelly.

One of the great questions that came up naturally when we were preparing this legislation, in 1972, was the pay the female faculty members received and their opportunities for advancement.

We looked at the Civil Rights Act which should also prohibit discrimination on the basis of sex; in fact that is where the real authority comes from.

The only question that I would have is in the handling of sororities and fraternities in the legislation. We may have left one type of sorority or fraternity or they may have. The other part is whether the legislation should touch athletics or not, whether it was an activity or program financed by the Federal Government.

That is one of the decisions that we have to make here in the committee and whether we approve of those regulations or not.

The question I would have pertains to the regulations which in their preliminary form were going to require equal treatment of the sexes so that you could not discriminate against anyone even in contact sports as they permit now. It seems to me what they have virtually said is that in many cases separate but equal is acceptable.

You say that separate but equal in a best world would not be acceptable the way I understand it.

Ms. KELLY. In the best world, yes. Right now I think we have the worst of worlds. Anything better would be acceptable temporarily.

Mr. QUIE. Do you feel that while evidently there is the feeling in the Civil Rights Act that there should be no difference in individuals because of race, the same thing should be true, that there should be no difference between individuals because of their sex? Or would you accept that in some instances there might be?

Ms. KELLY. When women reach a certain age, I believe it is 12, their muscle structure is such that their physical capacity, their physical strength is not as great as men in some cases, which is why most women are not linebackers I think.

I was unhappy with the distinction made about contact sports, especially calling basketball a contact sport because basketball is one sport where women truly excel.

I think separate but equal football teams would be fine. If you look at the example of wrestling, I don't think people would ever have to worry about a 100-pound woman wrestling a 250-pound man simply because in wrestling people are characterized by weight and size.

I think a lot of the bruhaha is just that. What people are worried about is coed wrestling.

Ms. VONHOF. What we are concerned about is that equal opportunity be available to women. You know, there are opportunities available to men that are not available to women.

Ms. KELLY. We don't even know if vast numbers of women would like to play football or choose some other sport.

Mr. ESCH. Would it be your feeling that we ought to minimize the impact of the revenue produced by spectator football and you are not in any way concerned about continuing on with that revenue base?

In other words, you would be willing to say that if HEW came out and said we have to equalize football it would be your position that that would be all right to do immediately irrespective of the revenue produced by that as a spectator sport?

Ms. KELLY. I believe most institutions would not have too much trouble coping with that simply because revenue sports in some instances are no longer producing that much revenue. In some cases they are going into debt.

Mr. ESCH. What specific evidence do you have of that? Do you have specific evidence of that?

Ms. KELLY. I am sorry, all I can give you is the example of the University of Minnesota where they were a quarter of a million dollars in debt the year before last. If athletics is truly going to be considered an educational program or activity they should be geared toward the average student on campus and not toward the super athletes although I think it is very necessary to reward those people and give them scholarships, I encourage that, but too much emphasis is placed on athletics as a spect[illegible] sport rather than a true athletic program or activity.

Mr. ESCH. You don't believe there are other secondary or tertiary benefits from spectator sports such as football in terms of the university community?

You are suggesting those are minimized.

Ms. KELLY. Definitely; but I think the financial situation that the athletic programs find themselves in warrants some kind of decisionmaking as to priorities.

Ms. VONHOF. Another point to consider too is that one whole sex is being relegated only to the role of spectators.

You have no choice to be anything but a spectator in most cases if you are a woman. I think I would enjoy spectator sports more if I were watching women play occasionally too.

Mr. ESCH. Thank you.

Mr. QUIE. What information do you have on individuals of both sexes playing on the same team, even being on the same track team, in the noncontact sports? Do you have an example of institutions where this exists?

Ms. **Kelly**. I can't think of specific examples although I have read frequently of where an outstanding woman athlete will run with a male track team or swim on the male swim team simply because the women's team is so minimal she won't be given the kind of training she really wants as an athlete so she trains with the male team because coaches are available.

In Minnesota most coaching is done on a volunteer basis by women from the physical education department. They oftentimes are not paid for coaching.

Mr. **Quie**. Would you have access to that information?

Ms. **Kelly**. Yes.

Mr. **Quie**. Could you provide it for us?

Ms. **Kelly**. Yes.

Mr. **Quie**. I would appreciate it.

[Ms. Kelly's information follows:]

Susie Kincade is a men's varsity diver at UCLA, Ellen Feldmenn and Susan Allen are both swimmers on the men's team at the University of Virginia, and Janie Oas participates with men's track at the University of Minnesota.

Mr. **O'Hara**. The gentlewoman from New York.

Mrs. **Chisholm**. This morning many of the gentlemen, the coaches who appeared as a panel, constantly said that they do not regard athletics as a part of the educational curriculum.

I would like to say for the record that discrimination in high school interscholastic athletics constitutes discrimination in education within the purview of the statute providing that "No person on the basis of sex shall be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any educational program."

But what I would like to ask both of you is, What do you think of the proposed elimination of the individual complaints?

How do you think that will affect women? Because I know that I have received hundreds of complaints from women throughout this Nation, particularly with reference to the educational institutions where they have not had an opportunity to rise within the system.

What do you think will happen if this individual complaint procedure is dropped?

Ms. **Kelly**. We feel strongly about that. We feel the only way a pattern of discrimination can be perceived is through individual complaints.

Of course I think you are denying an individual the right to make a complaint. I feel very strongly about that. I think most complaints that would be filed would not be class-action complaints but would be by individuals.

I think that it would be very difficult to find a pattern of widespread discrimination unless you go first to individual complaints.

I think that is a real fallacy on HEW's part that individual complaints are somehow not important.

Mrs. **Chisholm**. Do you think that would mean students who are athletically inclined would be able to get a fair deal under the current proposals as outlined here in the Register?

How do you feel about that?

Ms. **Kelly**. Are you referring to the enforcement guidelines?

Ms. **Vonhof**. Or the program regulations?

Mrs. **Chisholm**. The program regulations.

Ms. VONHOF. I guess in some sports a woman would not be able to get a fair deal under the guidelines, especially women's basketball—except under the provision that a school must provide equal opportunities according to the interests and abilities of both sexes.

There may be some recourse there. We feel in many sports there will be recourse under the guidelines.

Mrs. CHISHOLM. Thank you very much.

I have no further questions.

Mr. O'HARA. With respect to that, before I yield to the gentleman from Alabama, and I will very briefly, with respect to that particular question, as you know fears have been expressed not by male chauvinists but some women coaches that institutions of higher education might be able to comply with these athletic guidelines by establishing a single team in each sport in which they previously had separate men's and women's teams and effectively excluding from participation most of the women who now participate, because in many of those sports men have advantage because of their greater size and muscular strength, and that might end up hurting women's participation.

I would like to ask you if you interpret the guidelines to permit that sort of thing. In other words, could an institution that has formerly had men and women swimming, golf and tennis teams, for example, combine the teams in each sport and thereby comply with the regulation?

Ms. KELLY. I am inclined to doubt that most institutions would do that in trying to comply with title IX. To me it would be the best of both worlds if individual students had a choice to be on a coed team or one-sex team. It is up to the institution to undertake to determine what the students want.

Mr. O'HARA. Some might say, well, we can't have it both ways. We ought to have one or the other. You would not want to venture an opinion whether that would be permitted under the guidelines.

Ms. VONHOF. I think that would be the case of not complying with the spirit of the law in general and also the specific part about providing equal opportunities for both sexes according to their interest and ability.

Mr. O'HARA. Gene Thorpe, athletic director at Southern Illinois University, whom you quote in here is quoted as expressing a good deal of concern on that very ground.

The gentleman from Alabama.

Mr. BUCHANAN. As I understand it officially this is a joint hearing of several subcommittees, is that not the case?

Mr. O'HARA. No; this is a hearing of the Subcommittee on Postsecondary Education to which the chairman has issued invitations to members of other subcommittees.

Mr. BUCHANAN. This is for clarification. In any case I have been in the world a few years but I don't understand very much about it. I have been on this committee even less longer and I understand even less about it but I am the ranking representative on the Equal Opportunities Subcommittee.

One thing I do understand already is that the situation which you have described does exist as discrimination in employment and in education to a shocking and disturbing degree and that it is going to take really pretty strong medicine to ever get the situation straight.

Surely it must be an anachronism in light of the fact that more than half of the population is composed of women and 40 percent of the work force and the average situation in this country is two working parent families and there are many women the heads of households with children to feed and clothe and with ability that can benefit the society.

Since we are in a quorum call I want to let you know that I am personally very sympathetic to your approach to this problem. We may have a special problem in terms of athletics. If so, it is my profound hope that the committee won't take the position which would interpret away title IX, Mr. Chairman, but that we may make some specific legislative changes.

If title IX does not apply to athletics then why should title VI? Should you say you don't have to have blacks on your football team or your basketball team because they are not specifically federally funded?

If you do take that position you will have a much worse basketball team at the University of Alabama, for example.

I would hope we would go into specific language changes if we make that kind of exception for college athletics.

But you have indicated even if it cost money you still would proceed. The coaches indicate that if title IX should apply the financial interest would hurt women's athletics as well as men.

Do you have any response to that?

Ms. **Kelly**. Most schools have not been giving very much money at all to women's athletics. The figure is 2 percent of the total for women. I don't think you could hurt it any more than that really.

Two percent to me is next to nothing. Most women hold bake sales, candy sales, they sell T-shirts, they do all kinds of things to raise their own revenue because they are not being given any.

Right now it is so bad that I don't think they would be hurt any worse.

Ms. **Vonhof**. Another point is that I don't know how many schools there are that make so much revenue on their teams that they can support a whole athletic program.

I don't think that applies to a lot of schools. I think a lot of schools, very many schools support their whole athletic budget through student fees.

I would say most schools support some part of their athletic programs through student fees. If women are paying those fees on an equal basis with men then they should be provided with an equal opportunity to participate.

Mr. **Buchanan**. One more thing, Mr. Chairman, and I will yield.

The Chair, if I understood correctly, said at the outset of our hearings today that we had three basic alternatives we can take. We could say to HEW "your guidelines are OK." We could say "You have good beyond the law" and knock down the guidelines or we could bring about a legislative change to make some specific exclusion if we deem it to be in the public interest.

Now of the latter two alternatives I understand your testimony that you would say proceed with what you have and make it a little tougher.

If you had your druthers of the latter alternatives I assume you would have us, if we make any decision, make it a specific change of law rather than for the committee to be in a position of taking a weak or narrow interpretation of the application of title IX. Is that a correct assumption?

Ms. KELLY. Yes.

Mr. BUCHANAN. Thank you.

Thank you, Mr. Chairman.

Mr. O'HARA. Thank you very much.

Now in conclusion let me just explain for the benefit of those who are monitoring the hearing that although most of the testimony today has been with respect to the application of title IX to the field of intercollegiate athletics, my own concerns about the title IX regulations are not centered in the athletic area. They go to the requirements of regulations that I think may go beyond the law. As one example the regulations require all institutions to set up self-evaluation programs I am not sure that is included within the prohibition against discrimination found in the law. The regulations require all institutions to set up internal grievance procedures.

I think that is a wonderful idea. If the Congress had thought of it, I think it would have been a proper regulation. But I wonder if that is really contained within the scope of title IX as we wrote it.

The regulations in addition require all institutions to keep certain specific kinds of records for certain periods of time. I am not sure that that is within the scope of the law.

My major concerns are more in that area than they are in the athletic area although I recognize that very serious problems are posed by the athletic area.

I guess finally, and further to confuse the issue, that perhaps this committee might want to take two actions and that is in the athletic area perhaps try to legislate something that would seem to make sense to all concerned and maybe in other area just simply disapprove the regulations.

It may be that we will want to give separate but equal treatment to athletics and sort of separate that out because I think that is really attracting all the attention and it is not the major problem.

Mr. BUCHANAN. Mr. Chairman, may I add a footnote before you adjourn? That pertains to the gentlelady's question about the grievance procedures earlier.

You are aware that you still would have access under title VII to EEOC but that would not necessarily cover students.

Ms. KELLY. Right.

Mr. O'HARA. The committee will now stand in adjournment.

We will meet again Friday morning at 9:30.

[Whereupon, at 12:15 p.m. the committee adjourned, to reconvene at 9:30 a.m., Friday, June 20, 1975.]

SEX DISCRIMINATION REGULATIONS

FRIDAY, JUNE 20, 1975

House of Representatives,
Subcommittee on Postsecondary Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 9:30 a.m., pursuant to recess, in room 2257, Rayburn House Office Building, Hon. James G. O'Hara (chairman of the subcommittee) presiding.

Members present: Representatives O'Hara, Hawkins, Andrews, Blouin, Mottl, and Buchanan.

Staff members present: Jim Harrison, staff director; Webster Buell, counsel; Elnora Teets, clerk; and Richard A. Mosse, assistant minority counsel.

Mr. O'Hara. The subcommittee will come to order.

Today we are continuing our hearings on the resolution submitted to Congress for the implementation of title IX of the Education Amendments of 1972, which forbids sex discrimination in education programs or activities supported by Federal funds.

As I mentioned at the outset of the hearings earlier this week, we are not met to discuss the wisdom of the regulations, although I anticipate we will take some testimony on this subject. We are met to decide whether or not the regulations as they are written are consistent with the law, or whether they should be returned to the agency for redrafting until they are consistent with the law from which they must draw their authority.

It has been suggested that the policy decision, or policy questions involved here have a symbolic value that should be ahead of the issue of technical conformity with the law. Without underestimating the policy questions involved, I would have to disagree with that analysis.

The traumatic experiences this Republic went through during much of the last 2 years stemmed directly from the notion that there can be policy ends which are so important as to justify means which go beyond the law. This country I believe has handed down a ringing negative answer to that propostion, and whatever we do in the field of human rights as in any other field we must do in strict conformity with the law or we will build an edifice on the sand.

Our first witness today is a distinguished member of the faculty of Michigan State University, the president of National Collegiate Athletic Association, John Fuzak.

Mr. Fuzak, we would be very happy to hear from you.

STATEMENT OF JOHN A. FUZAK, PRESIDENT, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ACCOMPANIED BY STANLEY J. MARSHALL, SECRETARY/TREASURER, NCAA; THOMAS C. HANSEN, ASSISTANT EXECUTIVE DIRECTOR, NCAA; AND PHILIP B. BROWN AND MICHAEL SCOTT, NCAA's WASHINGTON COUNSEL

Mr. FUZAK. Mr. Chairman, members of the subcommittee, I am appearing in behalf of the NCAA today, and accompanying me are next to me, the secretary-treasurer of the NCAA, Stanley Marshall, who is director of athletics at South Dakota State University. On his left is Thomas Hansen, assistant executive director of the NCAA, and on my right is Philip Brown and Michael Scott, partners in the law firm of Cox, Langford & Brown, who are the Washington counsel for the NCAA.

We all appreciate the subcommittee's invitation to appear, and your willingness to listen to our views on the guidelines as they relate to title IX.

As some members of the subcommittee already know, the NCAA is a voluntary nonprofit association consisting of not over 700 4-year colleges and universities located in all parts of the United States. The NCAA is in general devoted to the promotion of physical fitness and recreational sports participation by students in its member institutions, and is particularly concerned with the maintenance and operation of intercollegiate programs for student-athletes.

The interest of the NCAA member institutions in HEW's title IX regulations is probably already well known to members of this subcommittee.

I understand from our counsel that the issue here is a narrow one—whether HEW's regulations are, or are not, consistent with the provisions of title IX. While in the last analysis, that's a legal issue—and I'm an educator, not an attorney—I have read both title IX and the HEW regulations, and if I may be permitted to say so, I find incredible disparities—in plain English—between what title IX actually says and what HEW says title IX says.

Let me expand on that.

Title IX says that no one shall discriminate, on the basis of sex, in operating any education program or activity receiving Federal financial assistance. I think we're all clear that intercollegiate athletics don't receive any financial help from the Federal Government.

HEW in its regulations expands, by nothing more it seems to me than main strength and awkwardness, the literal language of title IX, to cover not only education programs which receive Federal assistance, but also those which benefit from that assistance. Thus, so the argument goes, college football receives Federal assistance because, at least indirectly, it may benefit from federally guaranteed student loans unrelated to athletics.

On what authority does HEW make this bootstrap argument? Well, our lawyers tell us that HEW keeps referring to civil rights cases which infer that athletics are an integral part of the educational experience. With that conclusion, we at the NCAA heartily agree, in fact, it has been one of the basic principles of the NCAA—but that doesn't mean to us that Congress intended title IX to cover those intercollegiate athletic programs which, for example, are financed by gate receipts alone. Title IX doesn't say that, nor imply it.

When pressed on the issue whether under title IX, discrimination in a particular program not receiving assistance say, all-male football, requires termination of Federal funding of a program which does receive Federal assistance, the college medical school, for example, HEW incredibly refers us to a 1969 racial discrimination case involving a countywide school system, in which a Federal court of appeals held that discrimination in one program in that school system did not permit HEW to terminate assistance to the system in another unrelated program. HEW says in its explanation of the title IX regulations that this case stands for the proposition that Federal funds may be terminated under title IX-type language if they are "infected by a discriminatory environment." Now that's a rank distortion of what the court in fact said, and I quote:

> We note finally that the purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute. If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a State, within a county, within a district, even within a school (in short, within a 'political entity or part thereof'), is effectively insulated from otherwise activities. Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association.

Now how, on the basis of that kind of pronouncement, HEW could with integrity claim the right to drag intercollegiate athletics—in all institutions, without regard to paricular factual contexts—into the network of Federal assistance programs, is beyond me. What HEW is trying to do, clearly, is bootstrap the title IX references to separable "education programs" into a reference to an educational institution as a whole. We believe Congress knows the difference between an education program and an educational institution. Title IX refers to the former—not to the latter—and as far as we are concerned, HEW's regulations represent a clear distortion of the language of the statute.

Much has been said about the so-called Javits amendment adopted in 1974, which says that in writing the title IX regulations, HEW shall include with respect to intercollegiate athletics, reasonable provisions considering the nature of particular sports. This highly ambiguous statement is declared by HEW to be a clear indication that Congress intended that all intercollegiate athletics be covered by title IX regulations. In fact, however, when the Javits amendment is placed alongside title IX itself, the only reasonable conclusion is that the amendment refers only to those cases in which intercollegiate athletics are so directly benefited by Federal assistance that they must be said to receive such Federal assistance.

That the Javits amendment was not intended to sweep into title IX all intercollegiate athletics, however financed, is not a conclusion invented by the NCAA for its own ends. It is the conclusion of a principal author of title IX—Representative Edith Green. In November of last year—well after adoption of the Javits amendment—Representative Green said the following on the floor of the House:

> When funds for athletic departments come out of tuition, fees or tax dollars, women students are to have equal opportunity with men. But intercollegiate sports financed by gate receipts, is an entirely different matter, and was not covered by Title IX.

We suggest there is serious question—even assuming that title IX was intended to apply to all intercollegiate athletics—that the various arbitrary classifications of the regulations can by the wildest stretch of imagination be said to be consistent with the law. How, for example, is it consistent with a statutory requirement of no discrimination on the basis of sex to say that women must, under some circumstances, be permitted to try out for a men's team, but not men for a women's team in the same circumstance? On what conceivable directive of Congress can the regulations base a requirement that athletic scholarships be awarded on the basis of the respective proportion of male and female participants in the intercollegiate program? Where does the law say that separate locker rooms are appropriate, or that separate teams are appropriate? Representative Patsy Mink, in the debate on title IX, said that the law would require schools to be sex blind, and yet these provisions of the title IX regulations are clearly and simply sex based. We thought the separate but equal concept died with *Brown* v. *Board of Education.*

How does HEW's action square with Representative Green's characterization of title IX as requiring that American women be judged on "an equal footing, on the basis of merit, as individuals without the restraints, alibis, or subterfuges of a quota system"?

What in fact has happened here is that the Congress has written a law which clearly says that in federally financed education programs, sex is to be a neutral factor. What HEW has done is to convert this requirement of neutrality into an affirmative requirement of social action, in effect requiring the awarding of women's athletic scholarships without regard to skill, requiring the development of separate women's teams when women do not possess the skill to make the men's team, and making sure that when women's teams are developed, they can't be dominated by men. If Congress wants to write or mandate such a social action program, it can surely do so to the extent permitted by our Constitution, but we submit most urgently that such a program is *not* consistent with the statute now on the books.

Finally, I ask if it is consistent with the law passed by Congress, and the intent of Congress, that HEW promulgate regulations calculated effectively to destroy the financial basis upon which most universities are able to operate their present intercollegiate athletic programs for men and women, that is, by the use of revenue-producing sports to sustain all or a very major part of intercollegiate athletic budgets.

HEW has been absolutely unwilling to look at the economic structure and realities of college athletics, and has in effect insisted on treating revenue-producing sports in the same fashion as those—for either men or women—which are not revenue productive. We think this attitude is just plain unintelligent—particularly if you're trying to increase athletic opportunities for women.

Why? Let's look at the HEW regulations. HEW says that what is required in intercollegiate athletics is equality of opportunity for the sexes, but not necessarily equal per capita expenditures for the sexes. The problem for the athletic director, however, is that notwithstanding these sweet-sounding words, HEW has said that in assessing equality of opportunity, it is going to look at a laundry list of expenditure items: expenditures for facilities and coaching, game and practice schedules, availability of academic tutoring, travel allowances, and the like.

Nothing is said in the regulations about any different treatment for revenue-producing sports. Thus, presumably, given equal participatory interest between a men's basketball program which in 1975 covers all its expenses, and women's field hockey program which generates no income at all—publicity, game schedules, facilities, coaching, and all the rest must be substantially equivalent in dollars. That just doesn't make any sense, any more than it would make economic sense to require equivalent expenditures on revenue-producing football and men's fencing, which produces no income.

The net ultimate effect of the HEW regulations are entirely predictable. It is a documented fact that intercollegiate athletic programs are already in deep financial trouble. A special NCAA convention of all its member institutions—only the second special convention in NCAA history—is being held this summer to deal with the one subject of economy of operation. If the HEW title IX regulations mean what they appear to say—and Secretary Weinberger and his minions surely offer no solace in this respect—then the gross revenues from revenue sports must be as available for women's sports as they are for men's.

This of course means a diversion at most schools of revenues from a football or basketball program—otherwise used to maintain that program—to the coverage of expenses for women's sports which, at least as far as current indications of spectator interest are concerned, cannot be expected to generate any revenue. The inevitable result is a downgrading of football and basketball in quality and, ultimately, loss of spectator interest. And for better or worse, it is a matter of stark reality that most major college sports programs must compete directly with professional sports and other forms of entertainment for spectator interest and the income produced for the institution by that interest.

If HEW's objective is to destroy major college football and basketball programs, and thereby to destroy in many colleges the net revenues which these programs produce for the maintenance of other men's and women's sports, then the regulations are entirely comprehensible. We do not believe, however, that such a goal was part of the mandate given to HEW by the Congress in title IX.

For all these reasons, we think the Congress should reject the title IX regulations, at least insofar as they refer to intercollegiate athletics. The NCAA will thus support concurrent resolutions which are designed to have this effect, because we believe that the HEW regulations as now written are entirely unrealistic and are counterproductive.

I want to be clear, however, that we have taken this decision most reluctantly. Despite what one reads in the popular press, the NCAA and its member institutions have been, and are fully committed within the limits of all available resources, to provide the best possible intercollegiate athletic programs responsive to demonstrated interest of both male and female student athletes. That's not just a pious statement; it is fully supported in the record. Thus, for example, in the 7 years from 1967 to 1974, the number of women participants in NCAA member intercollegiate and extramural programs approximately trebled, and numbered in 1974 over 52,000. During the same period, the number of NCAA members offering five or more women's intercollegiate sports has increased fivefold. Today more than half the NCAA member colleges are in that category; 7 years ago, less than 10 percent could claim that prominence for their women's programs.

Let me cite a few examples of the opportunities available today to women at NCAA member institutions. Your chairman is a graduate of the University of Michigan, and, by the way, was awarded a doctor of laws degree at Michigan State so this next example is very special in view of your strong rivalry with Michigan State University.

Mr. O'HARA. I am glad you got that in.

Mr. FUZAK. I should refer to you as doctor, chairman.

Michigan football and basketball today pay for the entire intercollegiate athletic program. Five years ago, there were no Michigan women's intercollegiate teams, today there are six. Exclusive of administrative costs, $85,000 is currently budgeted for the games and travel of about 120 participants on women's teams. How does that compare with mens' sports? Leaving aside football and basketball, which pay for themselves, the comparable figure for about 260 participants in men's sports is $500,000. Some of these other men's sports—ice hockey for example, contribute significant revenues to the intercollegiate athletic budget.

At Wisconsin, $155,000 is today budgeted for women; at Kansas, $145,000; at Arizona State, $230,000; at UCLA, $270,000. At my own institution, Michigan State, there are 10 women's intercollegiate teams with 250 participants during the last year and with an aggregate operating budget of well over $150,000, as compared to 12 teams for the men. At South Dakota State—Mr. Marshall's school—there are 11 women's teams and 11 men's teams.

These latter examples, I assure you, are taken at random, simply to illustrate our point: Given the recent origin of significant and reasonably sustained interest by women in intercollegiate athletics, and given the fact that the member colleges of the NCAA have responded to that interest on their own, without either HEW regulation or Federal financial assistance, I don't think it is fair to say that NCAA member schools have not already made a major commitment to women's intercollegiate sports.

I have said the NCAA favors the Congress acting to reject the title IX regulations. Quite frankly, that is a rather narrow position to which we are compelled, by our lawyer's explanation to us of the precise nature of these proceedings—that is, you are to determine whether or not the regulations are consistent with the law, and reject them if they are not.

Given total freedom to take a position on the merits of applying equal sex opportunity rules to intercollegiate athletics, we would strongly support the suggestion made by Coach Royal of the Football Coaches Association earlier this week—that Congress declare a moratorium on any application of title IX to intercollegiate athletic programs, but at the same time requiring HEW to give real study (1) to the practical impact of title IX on these programs and (2) to the voluntary steps which have been taken and are being taken by the colleges to improve athletic opportunities for women. HEW, notwithstanding its protestations to the contrary, has never made such a study—principally, we believe, because there is no one in HEW's civil rights office with even the slightest practical experience with the administration of college athletics.

We believe such a study would establish two things: first, that the accomplishments of the colleges to date in this area, and the real promise of further future accomplishment, would raise the most serious question concerning the need for or desirability of Government intervention and control of yet another area of private conduct and yet another facet of university life.

Second, we believe such a study would also show that failure to provide reasonable protection for revenues from revenue-producing sports, to permit those sports to continue to be operated as in the past, will spell disaster in this time of economic crunch to the entire intercollegiate program at most colleges—and the opportunities for women student athletes, no less than men, will be severely impaired in the process.

The NCAA does not now advocate, and has never advocated, that revenue-producing sports be exempted from title IX. What we have advocated—if Congress ever acts to apply title IX principles to intercollegiate sports—is that the gross revenues from a revenue-producing sprot—whether it be a man's team, a women's team, or combined teams—be permitted to apply, first, to covering the expenses of maintaining that sport. If there is then an excess of gross revenue over expense in a particular sport, as there very often is in football and basketball, that excess—that net profit, if you will—should be used on whatever equal opportunity basis then represents the law of the land.

I repeat: We have never asked HEW or the Congress to exempt revenue-producing sports from title IX. We have asked only that NCAA members be permitted, if they individually wish, to maintain intercollegiate programs which have proven popular and therefore productive of revenue. Without a doubt, as surely as we sit here today, HEW's title IX program is calculated—and I think by some even intentionally so—to destroy those popular and successful college sports.

Thank you for your attention. We will be happy, any of us will be happy to answer questions.

Mr. O'Hara. Thank you very much, Dr. Fuzak. I appreciate very much your detailed statement and analysis of the situation from the viewpoint of the NCAA.

I notice that your final recommendation is one in which I am very interested, and let me make sure I understand this first.

Let us take an institution in which the football team produces revenue—well, let me ask it this way—when you speak of a revenue-producing sport, do you refer to a sport that produces some revenue, although perhaps not enough to cover its own expenses or do you refer only to those sports that produce revenue in excess of the expense of maintaining that sport?

Mr. Fuzak. In the sense that I have been using it, I have been using it broadly as revenue producing, even though the total expense of that sport may not be covered.

Mr. O'Hara. So, in other words, if, at an institution in a given year football produced revenue in excess of the expenses and basketball did not, as long as admission was charged and revenue was produced in each case, they would both be considered revenue-producing sports, right?

Mr. FUZAK. Yes, sir. That would be equally true of women's sports if they produce revenue, of course.

Mr. O'HARA. Yes. Then you would suggest that the gross revenues from a revenue-producing sport, and let's take, for instance, ice hockey, that the gross revenues from that sport, even though the expenses might be fairly considerable and there might be a net loss of revenue but the gross revenue would be available first for the maintenance of that sport, right?

Mr. FUZAK. Yes. That is because there is a potential to make a profit which can be used to help support other sports. For example, at our own institution, hockey has now moved into a profit making venture which helps to support all of the other programs.

Mr. O'HARA. Because of the new arena?

Mr. FUZAK. That is correct. We didn't have a large enough seating capacity previously. Only 200 people could see the ice in the old arena.

Mr. O'HARA. I had been there and it was very difficult to get a ticket, too.

Mr. FUZAK. That is correct. It still is.

Mr. O'HARA. It still is.

But then, in a sense, the institution decided for itself what was a revenue-producing sport by its decision as to what it would charge admission to, right?

Mr. FUZAK. Yes, sir. Unless there was an intent at evasion through the imposition of token admission charges.

Mr. O'HARA. But if you had a sport that was not very popular and you charged admission, even so it would produce very little gross revenue, I guess?

Mr. FUZAK. Yes, sir.

Mr. O'HARA. Well, frankly, I think that approach has some merit. I would like you to explain to me what sort of situation, and this is not in the regulations so obviously you didn't succeed in persuading HEW it would be a rational approach consistent with the law, but what sort of objections did you get from them on that approach?

Mr. FUZAK. The HEW people referred to the Javits amendment as clearly mandating an inclusion and argued that the failure of the Tower amendment indicated that the Congress did not wish to exempt or give any special consideration to revenue-producing sports. HEW's position ignores reality. In our own institution football and contributions provide 85 percent of the total operating budget which supports all men's programs and women's programs.

Mr. O'HARA. Let me ask you this. Let me take a specific example. When we began these hearings, we had a witness who gave us an example of what the witness considered to be discrimination on the basis of sex, and I will just present it to you and ask you some questions about how the approach you have suggested would affect this particular kind of a situation.

The witness presented to us a case in which a Big Ten school had both a men's swimming team and a women's swimming team and according to the witness, the men had two six-lane pools during prime hours 6 days a week to practice as compared to the women's one pool, which was four lanes wide 4 days a week and on the 5th day they had the use of the men's pool after the men were done, which was in the evening, 5:30 to 7.

Then she pointed out differences in terms of the equipment the lane ropes, pace clocks, equipment for back-strokers, starting blocks, locker and towel service and so forth. She went on, men are given two swimsuits, one practice suit, one meet suit, which they keep and the women one meet suit that they return at the end of the season.

There were other differences in terms of the equipment provided. In terms of value, the men are given $13 a day for food while the women are given $5 a day. The men have a bigger budget to schedule out of town meets and the men have their way paid to the nationals if they place in the top three of the Big Ten championships.

This year she said one male swimmer placed second and another placed sixth and both had their way paid to Long Beach, Calif., for the nationals.

One woman won an event of the Big Ten and placed second in another and a different woman placed seventh. The women were only allotted food and hotel funds which were not enough for all of those who qualified so three women stayed home and the one woman and the coach had to conduct a bake sale to raise the money to make up the $450 difference.

The men fly to their meets in one of the neighboring Big Ten States while the women don't go at all because of a limited budget, you know, that sort of thing.

Now under your proposed interpretation, would that sort of differential be possible?

Mr. **Fuzak.** Well, first of all, the discrimination is not appropriate entirely apart from the regulations in title IX. There are other provisions both State and Federal, which guard against inequality of treatment.

Swimming at the University of Minnesota is 2 years old and in the men's program I venture to say it has been going on for 30 or 40 years, maybe longer, 50 years. As a matter of fact, the swimming program probably was not a part of the athletic department operated under the department of health, physical education, and recreation. I am not that familiar with the program, so I would like Stan Marshall to respond to that, but there is no need for these regulations to deal with this problem. Such, discriminatory practices are unjustifiable and can be dealt with under the equal protection clause of the 14th amendment.

Stan, would you care to respond?

Mr. **Marshall.** The NCAA does not support this sort of difference between the men's and women's programs or within the programs for men or for women. The possibility that there are these kinds of disparities is probably very real, but we do not in any way endorse such discriminatory practices either in the men's or women's or between the two.

Mr. **O'Hara.** Let me present a hypothesis to you and all I know is what the witness told me so I don't want to get into it too much.

Let's assume for instance they charged admissions to both women's and men's swimming meets and that in the one case the gross revenue in the case of the men were, let us say, $10,000 and the gross revenues in the case of the women were $2,000.

Now, if that were the case, could you then, under your proposal, spend more on the travel and equipment for the men's team, at least up to the extent of the $10,000 of gross revenues than you did on similar items for the women which had only one-fifth of that revenue?

Mr. **Marshall**. That is not the intent of our proposal. Until very recently women leaders in the sports field opposed intercollegiate varsity competition. They were opposed to the intensity of competition. They were not in favor of promoting and developing varsity collegiate competition at an intensive level for the women.

On the other hand, men's athletic programs have been going on for 80 years and more, they have been in existence for that long, and it seems inappropriate to expect immediate parity. It often takes time to develop the facilities, and this is particularly true in periods of economic difficulty.

I guess what we are really pleading, though, is the idea that the baby was thrown out with the bath water. You have to provide protection for, in many of the institutions, the sports that have spectator interest, the sports that really support all of the others. That is the basis upon which many of our broad programs exist.

Mr. O'**Hara**. Well, I sympathize with you, and I sympathize with HEW, because it is a very complicated problem. I reserve my criticism mostly for the Congress for moving legislatively into this thing without thinking through the question of how it applied to intercollegiate athletics.

Of course, it is not unusual that we do things that way, but clearly we didn't, and we failed to give must direction to HEW in terms of how they were supposed to handle this.

I think the Javits amendment of 1974 is a classic of its kind for, legerdemain—now you see it, now you don't see it. We call upon them to adopt reasonable regulations in light of the differences in the activities involved, whatever that is, that is not much direction either.

But maybe we are going to have to figure out some way that, without unduly delaying the application of the quality standards, the Congress can direct some attention to amplifying and clarifying the statutes.

You know, I agree with you, and your counsel told you exactly right, we are not here to amend the regulations. We have no power to do that. We are here to approve them or disapprove them.

But there is always open to the Congress opportunity to clarify the legislation by further legislation. That may be a course we are going to have to choose in this case.

Mr. **Fuzak**. I would like Mr. Marshall to comment briefly on a concern that he has.

Mr. **Marshall**. I would like to speak to a concern, not as an NCAA officer, but as a person in charge of a division 2 program which is fairly typical of much of the membership of NCAA.

Our program at this point offers 11 opportunities for women and 11 for men. We do not break our funding down by sex, but at this point it is not equal, the rationale being equal moneys are not required to operate good programs in all areas.

I have a concern for the 40 percent of the total funding that I am personally responsible for generating through the assistance of our staff in a variety of ways.

The term "bake sale" was used here. At our university we have to conduct a $180,000 bake sale every year to make our program go, and it includes ticket sales, a blue scholarship program in an amount of $500 each, and a $250-fellowship donor, Jack Bunny Club, wheat program, a Junior Jack program, a perpetual scholarship program, and now a special program of athletic scholarships for women.

To be able to continue to operate an educationally sound program for all of our students, men and women, we need the opportunity to work at providing funds beyond what our institution can provide.

Now, to cite an example, we can take a football team this next fall to the University of Nevada. They will give up a $12,500 guarantee. We will be able to go, not in great style, but we will get there and get home, and produce a little income. If I cannot accept that kind of invitation, not only for the men's program but for the women's program, that severely harms what we are able to do.

I am told by HEW that I cannot accept that kind of invitation unless I can get one for the women. I think that is a discriminatory requirement that works to the detriment of the total program. That is my concern.

We have a deep commitment at our institution, and I think most NCAA institutions, to provide opportunities for athletic participation. The way HEW interprets title IX does not permit us that option.

Mr. FUZAK. I would like to supplement that briefly. This business of the bake sale, you know, often the women think this is unique. Our baseball program, which is really one of our major sports is coached by a former big leaguer, a great player, Danny Litweiler.

Each year he has put on some kind of affair to try to raise money to cover travel and increase his budget. For example, they have had a style show which was put on by the girl friends of the players and the players themselves. Both women and men participated in it. He has had a wine-testing party to raise money. He washes his own uniforms and baseballs. He makes the sandwiches. He and his assistant coach and several of the players make up sandwiches when they are on the way.

Many of our teams travel. The women would object strenuously to the travel provisions that the mens' teams must comply with. As a matter of fact, our hockey coach said, "I wish I had the women's freedom in travel." He said, "I go to South Bend, and I get $60 eliminated because I went too far in providing meals."

But these kinds of things are not uncommon. There are necessities for raising money and various teams work at them.

Mr. O'HARA. Mr. Blouin, did you have any questions?

Mr. BLOUIN. This is probably more of a comment than a question. I gather from your testimony and from that of the coaches who were here a couple of days ago that you see a direct connection between revenue generation and quality of athletics.

It strikes me, thinking out loud, as being very shallow economics if athletics and the quality of athletics, as you state on page 11 of your testimony, is so directly tied to revenue-producing ability.

I am concerned, frankly, about the purpose of athletics on a college campus—why it is there. It is either contributing to one's educational background or it is not. I firmly believe in the value of intercollegiate athletics. I firmly believe in the athletic expression educationally of their place on the campus, but unless we take a broader view of what we are doing we are really only a fueling system for professional football and basketball.

I was not here in the past Congress, and I am frankly, within the confines of the way the chairman explains our role, I am going to have to go back and dig out the testimony of the committees that handled title IX, and I am going to have to go to the Congressional Record and dig out the debate on the Javits amendment in both the House and Senate and try to arrive at some consensus in my mind as to what was intended, not what was said months after the amendment was passed, but what was intended at the time, and try to draw my conclusions on that basis.

So my comments, I guess, really have nothing to do with our purpose here, but I felt I had to say them.

Mr. **Fuzak**. I would like to respond to that because I think you misunderstand what was said. We are committed, and I think most of our institutions are committee, to a broad program of intercollegiate athletics. Unfortunately, our institutions, long ago, decided not to put appropriate funds into intercollegiate athletic programs. What they have said to us is: "You must support the athletic program on your own."

Now, of course, that leads to many problems. It would be ideal if the institutions said: "We are going to undertake total support of the athletic program, just like any other worthwhile educational endeavor." But they have not done so. The chances of them doing so now are practically nil, because all of the institutions are in economic stress. Inflation and increasing costs have far outstripped even appropriations in State institutions that were fairly generous.

So the chances of getting the kind of support that you are talking about—to support the program—the chance is very, very limited.

I don't think we are talking about the general quality of the program. I would say that one indicator of the general quality of a program is the breadth of that program—how many sports are there and how many of them appeal to different interests, both men and women.

But we are talking about a couple of revenue-producing sports that in fact support all of the rest through their contributions.

Mr. **Blouin**. The testimony of the coaches 2 days ago was to the contrary. They mentioned that the revenues generated from major sports on the campus that they were familiar with did not go into women's athletics programs or on their campuses, that they went into the minor programs, minor ongoing sports of the men, but that the revenues generally did not get over to the other.

Maybe it is much broader than that. Maybe that is some rare exception. That was Darrell Royal of Texas talking. I would like to check and see what the typical situation was.

Mr **Fuzak**. In our own institution and many others I am familiar with, the money left after covering the expenses of promoting a particular sport is used to fund minor sport programs and women's sport programs. Some of the expenditures are excessive. That is why we are having this national meeting, so that we can have a greater difference appearing between expenses and income, so as to be able to support our programs, broad programs, more effectively. The surplus goes into a general athletic budget, and that budget is divided without identification of dollars among the total sports program.

As I say, in our case we have had over 200; well, we are right at 250 participants. We have had a very excellent and effective program in my view.

Now, that money comes from the income generated by athletics. Consider the matter of fee allocation. Students are admitted to athletic events at a very low cost. It is much lower than that charged for high school events. So that subsidy might also be regarded as earned income.

Mr. O'HARA. Mr. Buchanan.

Mr. BUCHANAN. Thank you.

Mr. O'HARA. Before Mr. Buchanan begins, let me ask those present in the committee room to restrain their enthusiasm a little bit. The tradition of the congressional hearing is that demonstrations by those present in the hearing room are frowned upon. I am not saying that to chastise anyone, but I would hope that us hidebound traditionalists can be comfortable up here.

Mr. Buchanan.

Mr. BUCHANAN. I appreciate the Chair's assumption that my question would generate enthusiasm.

Mr. Fuzak, we are confronted here, particularly given the ground rule that the chairman just indicated of complete approval or disapproval, with really a knotty problem, and I hope you appreciate that.

More than half of the population of this country is female, about 40 percent of the work force. All of the statistics there are indicate that both in education and employment there is a dramatic difference between opportunities for men and for women in our society. I think that is just a fact that is virtually irrefutable. It has to be a major problem in a society where the norm has become that of a two-working parent family, or in which there are many women heads of households that have to earn income for themselves and their children.

Now, this athletic thing I think is the least of all of the considerations in my own standard, rather than something that applies across the board in education in the title IX regulations. I think it is very important to achieve equality on the basis of sex in our institutions that is involved.

OK, I wanted to establish that before I moved into this so, you understand, I think it is rather important as to whether we are going to give a broad interpretation or a very narrow and weak interpretation to title IX regulations across the board.

Now, as to athletics, we have heard testimony from representatives of the American Football Coaches' Association, whose witnesses were primarily comprised of coaches from major American universities, where the revenues from their football teams have proved to be highly profitable and definitely a source of income, but aside from those large universities, how are the other colleges and universities faring?

For example, my own alma mater has to give up football this year, and those who wanted to see it were alarmed, but we couldn't afford it because it was costing us too much money. Is the norm in the country that these sports make money so one can say it is revenue producing on a net basis, it is a source of income to the student, or is the norm that these are revenue-losing activities?

Mr. FUZAK. I would like to ask Mr. Marshall, who is director of athletics and representing a division 2 school, to respond to it because I think his school fits into that picture.

Mr. MARSHALL. In our institution we generate about 40 percent of the total cost of intercollegiate athletics and intramural activities. Football does not produce revenue in excess of the total cost if everything is figured; that is, proration of salary. Basketball's revenue position is similar. I think that is fairly typical at least of many division 2 or division 3 types of institutions.

Mr. BUCHANAN. You would say the norm is that these activities are generating income?

Mr. MARSHALL. That is correct.

Mr. BUCHANAN. Then before I go further, why not make your request where income is generated rather than revenue, because you can charge $5 for a ping-pong game, and say it is a revenue-producing sport by your revenue definition. Why not say where income is generated?

Mr. MARSHALL. I do not believe that anyone in the NCAA is seeking to write a provision that would allow evasion of the requirements of title IX through adoption of a nominal charge for admission.

Mr. BUCHANAN. I am not saying that, but I am simply saying that you could give such broad coverage under the definition of anything that produced income, I mean that generated revenue, whether it was a losing or winning proposition.

Mr. O'HARA. Will you yield at this point?

Mr. BUCHANAN. Yes.

Mr. O'HARA. Of course, you have a problem the other way.

Mr. BUCHANAN. I don't have a way yet. I am exploring.

Mr. O'HARA. But, in answer to that question, one of the coaches before us was from Maryland, Claiborne, and their football program had been highly successful in the 1950's in producing revenue, and then it had fallen on evil days, and it was a loser for the athletic department, and now I think Mr. Claiborne said last year they had produced net revenue, and I imagine that is a cycle which you sometimes see.

Mr. BUCHANAN. I am sure the chairman is correct. I am not trying to make a point, but trying to explore this problem, because I just want to know whether the typical situation is making money or losing money?

Mr. FUZAK. Football programs have immense value to an institution. Recently we had our economy meeting in Kansas City. We were trying to lead up to a national approach to cutting costs. One of the small college presidents said: I have discovered how very important it is to us to have an athletic program, and particularly football, because we have to draw students and the costs are very high, and it is very important to us to have a football program. That is almost a direct quote.

So even though that football program didn't directly make money, it indirectly produced revenue for the institution. I think that much of this depends upon the level the school aspires to. Too often a school at a small college level wants to be a national power or the middle school wants to be way up at the top level and when they strive to do that it is very costly. They don't have large enough stadiums or do not have enough spectator potential to finance such an expensive program.

Then, of course, what happens is a kind of disillusionment which results in cutting the entire athletic program or cutting out the football program.

Mr. **Buchanan**. Let me get back to the relative position of men and women in athletic activities in the colleges and universities in our country. We had testimony that women's sports do not produce the interest as a spectator sport that are found in men's revenue-producing sports. As one who watched Chris Evert and the former Miss Goolagong playing tennis, is hard for me to understand that. Maybe I have a warped mind, but I would rather watch them than Jimmy Connors.

But anyway, could this fact be attributed to the substantial denial of opportunity to women to participate in athletic programs and could it be remedied by requiring that women to be afforded every possibility to be able to participate?

Mr. **Fuzak**. Women's varsity athletics are not less extensive than the programs for men because of discriminatory practices Women leaders, and I think I can say this fairly, did not favor going into varsity intercollegiate athletic competition. It has only been in recent years where this has changed and opened up. I know I can cite you and illustration in our own institution. A Canadian Olympic gymnast on our campus gave a few exhibitions and interest among women students was excellent.

We tried at that point, about 12 years ago, to get started in having a woman's gymnastic team and perhaps move into other sports. We were strongly opposed by women who had leadership positions on the campus. They indicated they preferred not to have competition but rather to have what they called play days. I am not saying it in a derogatory sense, they believed intense competition was harmful and would rather see good relationships fostered through a relaxed and much more easy competitive situation.

So I think, when there is an attempt to ascribe the present state of discriminatory practices, that is inappropriate. Again, I don't think it is appropriate to expect women's varsity sports in a period of 5 years or 6 years to be at the same level and with the same facilities, the same coaching and administration, that a program that is 80 or 85 or 90 years old has.

I think the differences relate to history and development.

Mr. **Marshall**. May I comment on that. If my president came in and said, How much money will it take to put us in complete compliance with title IX and meet the needs of all of our students, satisfy our women coaches and those responsible for women's programs, I would not know how to respond to him, because there is a wide diversity of opinion among leaders in the women's movement as to the direction of intercollegiate athletics for women.

Some want the opportunity to produce revenues, as you indicated, the opportunity to recruit, the opportunity to be a full-time coach, the opportunity to be able to conduct bake sales, about which I spoke, to raise money for scholarships, and the opportunity to be fired and hired on the same basis as men.

Others are saying, no, we want something different and unique. We want it completely within the educational framework and treated the same as everything else in education, with tenure, protection against being fired~~, and~~ not having to go out and generate income and those kinds of things.

In all sincerity, I could not respond to him if given that question at this time. I think it is a key issue and another reason why we need to have an impact study and we need to determine exactly where it is we want these good women's programs to go, where they want to be in 5 years, 10 years, and to assist them in getting to that point. I endorse that completely.

Mr. Buchanan. One more moment, Mr. Chairman. We had testimony earlier from the National Students Association, which was to the effect that the women's portion of the athletics in the typical situation, would be about 2 percent of the total collegiate athletic budget. I have here a publication showing the relative percentages for men and women in various particular institutions.

The black line there, is that for men and the red line is that for women in this chart, and do I gather, you are not challenging the fact that there isn't a basis as to why a good deal more is spent for men than women, but simply saying this is primarily the case because this has not been a goal of women before, and do I gather that is your testimony?

Mr. Fuzak. That is part of the answer, but not all. Stan?

Mr. Marshall. I would challenge the 2-percent figure. I would suggest this is an old figure. I am not, however, prepared to give a new figure, so I stand as a critic without a better solution to it. I would indicate at this point in time there is more money spent on men's programs than there is on women's.

Mr. Fuzak. As indicated in my comments, if you eliminated football and basketball, you would find much less disparity between what is expended on the men's and women's programs. For instance, a relatively new program at the University of Michigan has a differential of $85,000 as compared to $500,000. That is more representative of the current disparities. The University of Michigan is just getting into women's sports. Our own Michigan State program would be more typical. Our figures are $458,000 as compared to $150,000. So that is the kind of comparison there is if you eliminate football and basketball. These figures cover only the operational budget and include neither administrative costs nor any assignment of cost figures to the use of facilities.

Mr. Buchanan. If you eliminate football and basketball, would you find a roughly equal situation to be there?

Mr. Hansen. Could I respond with information on one program at the University of Washington, of which I am a graduate? This coming year $200,000 is budgeted for the women's swimming program and $300,000 for the men's program. This is a nationally prominent program with a total budget of $2.9 million. It is the disparity in football and basketball that takes the picture out of all possible equality. There is no conceivable way it can be equal in those two sports, but you can see in a growing women's program at the University of Washington the budgets are very much comparable.

I might add, unfortunately, that when the State attorney general heard of the title IX regulations he immediately advised the University of Washington to cancel all grants-in-aid to all male athletes except in football and basketball. The university did so. The swimming team, for instance, would have been third in the NCAA championships but finished sixth after hearing this bad news. The University of Washington is no longer getting aid to male athletes except for football and basketball.

Mr. BUCHANAN. I wonder about my last question. If you excluded football and basketball, what then?

Mr. HANSEN. You mean the percentage? Well, we are not prepared to give that on any national basis.

Mr. BUCHANAN. No, I mean, would you find it fair that a roughly equal amount of money be spent on men and women if you exclude football and basketball?

Mr. FUZAK. I think there are questions that relate to that. I don't think you can determine fairness necessarily on the amounts of money that are spent. For instance, we have three men's sports where there is no recruiting off campus and where there is no athletic aid and where we have a part-time coach. Those sports are lacrosse, soccer, and fencing.

Now, the comparisons which are usually made are comparisons between football and basketball, not sports such as soccer. What I am saying is, there are great differences among men's sports programs and expenditures, as great as there could be with women. So I think the point is that it is inappropriate to judge fairness in terms of dollar expenditures.

There are so many complex factors that enter into it. It depends upon the locale of the competition, for instance. Now, in the one instance, travel may be a major factor in terms of the costs related to a given sport. As a result, sometimes we drop a sport.

We, at Michigan State, had boxing for many years and there were two reasons for dropping it, but one was we had to go too far for competition and it was too costly in terms of travel. If you are competing in your immediate locality, such as we do in soccer—we compete with small colleges essentially—the transportation costs are very low.

Now, to judge that soccer program and the equality of it on the basis of expenditure is inappropriate.

Mr. O'HARA. Mr. Mottl.

Mr. MOTTL. Thank you, Mr. Chairman. Before I ask my questions, I would like to just state that Coach Woody Hayes told me at Ohio State University there is going to be $185,000 expended for women's athletics next year and they have 11 team sports now and 8 full-time coaches at Ohio State University.

Were the members, Mr. Fuzak, the members of the panel, were members of NCAA disappointed when the President of the United States, because he was a former great football player at the University of Michigan, when title IX rules were promulgated by HEW, was there any disappointment by the members?

Mr. FUZAK. Disappointment with President Ford?

Mr. MOTTL. Tacit approval of title IX.

Mr. **FUZAK**. I might say I can speak for myself, yes, there was great disappointment. Although I think some of us may have expected it.

Mr. **MOTTL**. We prefer the adage "killing the goose that lays the golden egg," and do you believe this would probably describe what is happening here with title IX as far as intercollegiate football and basketball?

Mr. **FUZAK**. Certainly in major programs it could be the case. It would have an impact, I am quite sure, across the board but somewhat less impact at smaller institutions, smaller colleges, and perhaps less impact in some of those schools that have aid based on need, but it would still have an impact, because of certain requirements that I say are inherent in this, the checklists relate to expenditure items. Every institution, large and small, would be affected by it.

Mr. **MARSHALL**. A quick comment. At our level, a division 2, where we must raise money in the amount of about $150,000 for our grant in aid program, it would certainly have a bad effect on our ability to continue our program if we cannot generate moneys for specific programs and cannot accept invitations where a grantee is paid and so forth.

Mr. **MOTTL**. Mr. Blouin, my Democratic colleague, stated before that he listened to Darrell Royall and I think if you relate to this question or answer it, the University of Texas is unique in their program in that all of their funds go exclusively for male athletes, but isn't it the rule generally that both female as well as male athletes earn proceeds?

Mr. **FUZAK**. I think it is much more common, but I am afraid I can't answer for every one.

Mr. **HANSEN**. As a model, I again cite the University of Washington and their support for both intercollegiate programs for men and women. At this time, there is great diversity of administrative structure across the country in different types of universities and some have combined and some have separate programs. It is difficult to know if it goes directly, but at those schools where the programs for men and women are combined, the revenue is used to support programs for both men and women.

Mr. **MOTTL**. Could you fully explain once again your proposed compromise with regards to the lesser sports, so to speak, like baseball and track and tennis as to how the funds would be shared equally in those sports after football and basketball net profits would be figured?

I think it would be helpful for the committee if you explained that compromise.

Mr. **FUZAK**. What we are suggesting, has been misinterpreted, we have not asked for exemption of revenue-producing sports. All we have said is that the institution ought to have the opportunity to apply revenue or make a decision in terms of application of revenue to that sport and its promotion and its development before whatever is left is used in other sports.

I think the remainder would be shared among all other sports, both men and women.

You know our own institutions have requirements. It is inappropriate to assume that such a condition as indicated by Darrell Royall is likely to continue—in terms of our own institutional requirements and in terms of our own institutional pressures.

Very few presidents or boards of trustees or regents would go along with that for a very long period of time as the women's varsity programs develop.

Mr. Mottl. Could you explain, and I think you touched on it before, as to—well costs have gone up and the scholarship programs in various universities and colleges have been affected, and could you expound on how that happened a little bit?

Mr. Fuzak. Yes. A whole variety of costs have increased, many due to inflationary situations and many of them due to even internal raising of costs. For example, salaries of coaches and fringe benefits in relation to those salaries have increased tremendously. Cost of equipment has increased. Cost of maintenance. Cost of travel.

For instance, again, I can give it best by an illustration from our own institution. Our football team flew from East Lansing or from Lansing to Champlain, Ill., to play a football game, I guess that is 3 years ago now, at a cost of $7,000 for all transportation of the team and related personnel. Two years later, we went down there at a cost of $13,000. Since then, the costs of travel have increased much more rapidly than they were increasing at that time.

So a great many costs have continued to go up and the limits of our income production are close at hand. It is impossible to increase football ticket prices beyond a certain point without losing the balance.

Mr. Mottl. Has it cut down appreciably on scholarships for other sports, too?

Mr. Fuzak. Yes it has and also on football. For example, in a relatively recent convention of the NCAA we limited grants in aid in football to 105. We are now limiting it or proposing to limit it at the next convention. One proposal would limit it to 80 in football and another one would limit the number of football scholarships to 90. There are still other proposals.

Mr. Mottl. What about the other lesser sports?

Mr. Fuzak. In the other sports there are several kinds of proposals and, of course, it is impossible to know what the reaction of the convention will be. There is a proposal to limit tuition and fees grants in all other than football and basketball.

Mr. Mottl. Basically, this is going to hurt the minorities more because I think there is a disproportionate number of especially black people playing football and basketball, so minorities will be hurt by reduction in the number of scholarships, is that correct?

Mr. Fuzak. Well, I am not sure that will be the result.

Mr. Mottl. But there is a possibility it could happen?

Mr. Fuzak. Yes, it is a possibility. But I don't think it is very likely.

Mr. Mottl. Now, you touched also before on the difference of the motivation for male and female athletes as far as the different organizations for competition and winning. Could you elucide a little more on that, please?

Mr. Fuzak. Well, I am talking about the past, where, for example, there was indeed active opposition to the women getting into intercollegiate athletic competition. That has changed, although there are great differences among the women at the present time as to the extent they wish to go in their programs as Mr. Marshall had stated.

There are those who believe there should be no grants-in-aid for women. The title IX regulations would appear to foreclose this desire, indeed, even the courts have told them this.

Mr. **Mottl.** Basically, what you are asking Congress is if we would introduce and pass a resolution in the House and Senate to give more time and study to this entire problem, is that correct?

Mr. **Fuzak.** That is correct. We do not believe that any effective impact study has been made in spite of what HEW says.

Mr. **Marshall.** Just a quick comment. I personally do not endorse the proposition of major and minor sports or lesser sports. Our attempt, I think, throughout NCAA, certainly our division two institutions, is to treat them as much as possible in a like manner, men's and women's sports, but we do need some relief to accept the outside help that may be available by a guarantee, by a ticket, by a donation to a given sport.

I think we are also committed, if that is the direction that women want to go, to promoting their sports in that same direction. I also believe that people will come, as Mr. Buchanan mentioned, to watch women participate. I don't buy the proposition that they will never come and watch women participate.

In the State of Iowa, there are high school girls' basketball programs that draw very well and they bring in considerable revenue. As an athletic director. I would be somewhat less than bright if I didn't explore all possibilities on both the men's and women's side.

But I need relief in terms of guarantees and tickets that are purchased to see specific activities for men and women.

Mr. **Mottl.** One last question, Mr. Chairman, if I may.

In your interpretation of the rules promulgated under title IX, under your interpretation, would there be anyone precluded, any male athletes precluded from trying out for women's sports? Maybe they don't have as much ability as necessary to go to the male varsity football and basketball teams and would they be precluded from trying out for women's teams?

Mr. **Fuzak.** Yes, I believe that is true.

Mike, would you comment?

Mr. **Scott.** Mr. Mottl, the regulations use language which does not say that in so many words, but it refers to situations in which opportunities have previously been limited. We believe that it is intended to mean in the normal case that in certain situations women must be permitted to try out for a single men's team sponsored by a university, but that men cannot try out for a women's team. I think that is a matter of social policy. If somebody is writing legislation and wishes to develop athletic opportunities for women, this might be something that someone would think was a good idea.

But we don't find that in the legislation. We do believe that this provision, which has very little explanation, was intended to create opportunities for women on men's teams but not men's opportunities on women's teams.

Mr. **Mottl.** Thank you.

Mr. **Marshall.** I think there is a good bit of misinformation going about relative to contact sports. I have seen newspaper articles about relief for contact sports and exemptions for contact sports in title IX. I don't believe it says that, but I might refer that also to legal counsel.

Mr. Brown. No, there is confusion, Mr. Chairman, that the contact sports have been exempted from title IX. This is not true. What the regulations do is to permit separate teams where the eligibility is based on skill or where it is a contact sport, but all of that is within the context of equal opportunity requirements of the regulations.

Mr. O'Hara. Mr. Andrews.

Mr. Andrews. No questions.

Mr. O'Hara. Mr. Hawkins.

Mr. Hawkins. Mr. Chairman, Mr. Fuzak, one page 3 of the statement, the issue raised seems to be whether or not college football receives Federal assistance. It seems to me the weight of the argument that is being made relies heavily on the assumption that college athletics, including football, do not receive Federal assistance. Is that the thrust of the argument?

Mr. Fuzak. That is correct, direct Federal assistance?

Mr. Hawkins. Direct.

Mr. Fuzak. That is what title IX says.

Mr. Hawkins. What about indirect? Does it receive indirect Federal assistance?

Mr. Fuzak. Well, we maintain that it does not get any. Now, if you were to go to the furthest extreme in defining indirect aid, of course everything is affected by having Government—the roads, and so on. I think the language of title IX, though, is rather clear in that it says "receiving assistance." We maintain that it does not receive assistance.

Mr. Hawkins. I would agree it is obviously a difficult thing to ascertain, but let's understand to what extent Federal assistance may be available to those who may be involved in athletics and specifically football. Would you say that any of those who participate in football may be receiving work study basic opportunity grants or any other help due to assistance programs, involving any of these student assistance programs?

Mr. Marshall. Yes, sir; there are students under various Federal programs, work study, who do participate in athletics, both men and women, and it seems to me we cannot deny opportunity to those people to participate simply because they have Federal assistance in the form of a grant, job, or loan based in any way on athletic ability. It is handled by a financial aid office on the basis of need.

Mr. Hawkins. How would receipt of financial assistance to an individual deny that individual an opportunity to participate in a particular sport?

Mr. Marshall. If accepting students who received Federal aid meant that my football program was considered to be federally funded, I would then have to, in some way, attempt to come up with matching funds, let us say, for my field hockey program.

Mr. Hawkins. Are you saying that there are disadvantaged students who require this type of assistance in order to get a college education so that from a practical situation it would deny the individual a right to participate in a sport because it would disqualify that institution or that sport from receiving this?

Mr. Marshall. No, sir; I would fight that to the end, but it might place me in a difficult position if, let us say, 10 students with that kind of assistance came out for football and HEW, given this material they now have to work from, ordered me to give equivalent aid to field hockey, to cite an example. I would then have to be responsible for providing 10 grants for field hockey.

Mr. HAWKINS. What would you do under that situation?

Mr. MARSHALL. If I got exactly that directive, well, it is my intent to keep my job and also my intent to abide by the law and I would struggle to try to raise at my bake sales the money to provide the 10 grants for field hockey. It would be very, very difficult to do it, but I would certainly try.

Mr. FUZAK. I would like to ask our legal counsel to respond.

Mr. BROWN. Mr. Hawkins, I think that the question, this question and others should be considered in light of the literal wording of the statute. Under the statute, we are talking about a provision that says:

> No person shall, on the basis of sex, be excluded from or denied the benefits of or subjected to discrimination under any education program or activity receiving Federal assistance.

Now it is a matter of what is the commonsense interpretation of that phrase.

Our position is that there is no Federal assistance going to the athletic programs of the colleges and universities of this country.

The same type of wording appears in the enforcement section of the law, in requiring compliance, permits termination or refusal to grant such assistance to a recipient not complying. There, again, it talks about the particular program or part thereof in which such noncompliance has been found.

I think we are simply taking a commonsense and literal reading of these words. Because there is no Federal assistance to the athletic programs of our institutions this provision does not apply.

Mr. HAWKINS. Well, I am not so sure. In the report, we backed up that particular position with respect to assistance which may be indirectly received. I am not so sure what the facts are concerning any direct assistance and whether or not all of those who belong to the association stand in exactly the same position. But would you say that the opinion you have rendered applies if assistance is indirectly received?

By indirectly, let's cite just a few examples in which some Federal assistance might also be received—basic opportunity grants, work study programs, student loan programs. He might even be financed by some Federal funds in athletic fields and gymnasiums. Assuming then that this type of Federal assistance, or any combination of this type of Federal assistance had been received, which in effect, benefited that particular sport, would your opinion still be that equality of treatment is in some way contrary to the law?

Mr. BROWN. We know of no Federal assistance to sports facilities. In fact, the law is quite clear that the assistance goes to the educational facilities, classrooms, laboratories, but not to athletic facilities. And as to aid to an individual student, I don't consider that within the wording of the statute that says, "education program of activity receiving Federal assistance."

If we are talking about a science research program, or if we are talking about an athletic program or any other program, I think the question is does the assistance go to that program.

Mr. Hawkins. What about the individual? If the assistance goes to the individual, does it keep the individual in the university?

Mr. Brown. I don't think that would be applicable.

Mr. Hawkins. He plays football although he attends the classes. Do you still maintain that is not in any way assisting that boy?

Mr. Brown. I know of no Federal football scholarship aid. I think you are talking about scholarship aid generally and I would not consider this kind of aid to an individual to be within the scope of the wording of this statute.

Mr. Hawkins. Your position is then that there is no Federal assistance involved with that particular boy?

Mr. Brown. That is right.

I might add, this does not mean that we are taking some kind of technical position that is intended to facilitate discrimination. Far from it, there is a line of cases that arise under the equal protection clause of the Constitution and involve State aid largely to high school students, court decisions which make it flatly clear that it is illegal to discriminate. I think the basic framework of our whole legal system is strong in its antidiscrimination requirements.

I think our problem here today is a narrow question, as the Chairman stated, as to whether these regulations are in accord with this statute. I say as the regulations purport to extend the reach to athletic programs of colleges and universities not receiving Federal assistance, that they have exceeded the statute and are illegal.

Mr. Hawkins. I just am trying to determine whether or not certain sports in any way fall within the category of "all other institutions" and in some way rub off a little bit against some of the democratic processes. If it does, then, it would seem to me that it obviously belongs in the same category as the others.

This is not a conclusion, but I am simply trying to ascertain from you the position about which you apparently concluded on page 15, which I thought was a rather interesting one. If there is surplus, we sort of apply democratic processes and morality and abide by the constitutional principles, but if there is a deficit, then I wonder who picks that up when we don't do it?

Mr. Brown. I think all we are trying to do is, in our successive legal arguments is to interpret the intent of Congress.

Mr. Hawkins. May I just shift to one other point and then I will conclude, Mr. Chairman.

Who selects the coaches? Who makes the decision as to allocation of money to various sports, and who determines these policies at the college level?

Mr. Fuzak. I will ask Stan to respond to it in terms of his institution. I think I can respond in terms of a collective group.

Mr. Hawkins. Just in general.

Mr. Fuzak. Well, this is so difficult to respond in a diversity of cases from small colleges to others. But I will ask him, in his institution, both as to sports clubs, intramurals, and athletics, and so on.

Mr. Marshall. Our athletic program in hiring is operated out of the Department of Health, Physical Education, and Recreation, located in our college of arts and sciences. All of the people hired, including teacher and coaches, are hired in the same manner as other people on the campus and have opportunity for tenure and work in the same sphere as do the professors.

In terms of determining budget allocations, which you mentioned, for the academic side, I work for the dean of arts and sciences. Just a quick aside on our buildings, we have recently completed a $4 million building, and I spent considerable time in Washington attempting to get Federal funding for it. Every agency I talked to was very, very careful to point out that no money can be allocated for intercollegiate athletics, a portion which was strictly instructional and figured on a space basis could be allocated. But our budgeting then is handled in that manner for intercollegiate athletics, having student input, because some of our money comes from a fee paid by the students.

We have institutional input, because some comes from them. We have outside input in the form of one person, a representative of our alumni group, and their advisory council in this case for athletics, intramural and recreation develop the budget. I must make a proposal to them and it is accepted, rejected, modified, and so forth.

Mr. FUZAK. Mr. Brown.

Mr. BROWN. Congressman Hawkins, if I may supplement the answer for another small institution, I happen to be Chairman of the Board of Trustees of Wesleyan University in Middleton, Conn., and athletics of all kinds, intercollegiate, intramural, or club, are just part of our overall budget, and we can sell $2 or $3 tickets to football games when we play Amherst or Williams, but the entire athletic program is simply one element of the overall university budget.

The professors and coaches who are hired within that department are hired in the same way and subject to the same equality considerations as within any other of the departments. So there are, I think, considerable variances between sports at major institutions and sports at smaller colleges.

Mr. FUZAK. Mr. Hawkins, in terms of our own situation in my institution, and this is very common in many institutions, we operate on the basis of faculty policy control of intercollegiate athletics. That is, our athletic council must have on it a majority of faculty members, but we also have students and some alumni representation, as well as administrative representation. One of the executive vice presidents is a member of that council.

That council has a finance committee, and a budget is prepared for athletics. That budget is presented to the finance committee. That finance committee reviews it and eventually the athletic council must approve it. Then it goes to the president for his approval. So we have that kind of process.

In the hiring of coaches, who are not in the academic pattern, that is, they are not teaching, and that represents a relative few, primarily football coaches, they are hired, again, through the process of the athletic director, then the approval of the athletic council, and eventually the approval of the president and approval of the trustees. That is the kind of pattern we have.

Mr. HAWKINS. Would you say that the athletic activities or department then is really not separable from the rest of the university; that the interchange throughout the university is present and this applies not only to athletics but every other phase of that university life?

Mr. FUZAK. Well, except that I don't know of very many areas which must support themselves economically.

Mr. HAWKINS. When I get my invitation to UCLA and USC football games, as I am on both alumni associations, the alumni association approaches me, not the coach or the athletic department. I assume they do that as a benefit to the sport itself.

Mr. **Fuzak**. Well, in the hope that you will make contributions, which I am sure you must do to both.

Mr. **Hawkins**. I have never seen a game yet unless I had to pay, let's say that. That is a good place to end.

Mr. **O'Hara**. Thank you.

Mr. Buchanan for one more question.

Mr. **Buchanan**. Thank you, Mr. Chairman.

Gentlemen, I hope I am at least realistic enough to understand this—I would rather take on all of the politicians and public officials in the United States than either Bear Bryant or Coach Jordan on this issue. Maybe it is because they are the best, but I think that there are other people in comparable positions in most States, coaches and athletic directors, who are justifiably very popular and highly respected people.

That being the case, I am interested in nailing one thing down. Notwithstanding I understand your attorney's feeling that title IX does not cover activities that are not directly federally financed, we have exempted by legislation certain activities already, therefore an alternative does appear to me to be available to us. Rather than just disapprove the totality of title IX, to offer the legislative remedies along the lines you suggested? Would that suffice?

Mr. **Brown**. Congressman Buchanan, I think that would suffice and would also offer opportunity for clarity.

One of the things that is seriously of concern to me about the regulations is the vagueness of the entire section as to what an institution, even if it had the money, and even if it has acted in perfectly good faith, should do in order to comply. Because of that vagueness, they remain vulnerable to arbitrary enforcement procedures.

I don't for a minute concede that that was the intent of Congress.

So in an all-pervasive way I think the regulations seriously failed to match the standard of the statute. Now it can be cured by rejection of the regulations, or it can be cured by a further statute which is addressed to the specific problem.

Mr. **Buchanan**. Thank you very much.

My great concern is this: Under the 14th amendment, there is a clear protection and remedy in the Constitution even if the law is narrowly interpreted, in cases of discrimination on the basis of race.

In this case, given no equal rights amendment for women, it may be that we have to provide by statute for whatever relief is extended at this point. If that is the case, I would hate to see the total progress embodied in the title IX regulations go down the drain because of one area of application, without challenging your comment as to the vagueness.

[Supplementary information on this point follows:]

Cox, Langford & Brown,
Washington, D.C., June 20, 1975.

Re HEW Title IX regulations.

Hon. John Buchanan,
U.S. House of Representatives, Washington, D.C.

Dear Congressman Buchanan: In your questioning of the NCAA witnesses this morning, you appeared to express concern that because the Equal Rights Amendment was not law, there was no present Constitutional prohibition against sex discrimination in intercollegiate athletics. You referred the Fourteenth Amendment as containing such a prohibition in the case of racial discrimination, and at least as I understood your question, you did not believe that the Equal Protection Clause also provided protection against sex discrimination.

Simply to clarify the record, the NCAA has asked me to write to say that it is *our* understanding that the Equal Protection Clause does indeed prohibit discrimination based upon sex, by any state agency or state instrumentality (it being rather clear that any state-supported college or university is such an instrumentality), when such discrimination cannot rationally be justified in terms of a legitimate state interest. In other words, women *do* enjoy under the Equal Protection Clause of the Constitution a right against discrimination which does not have a reasonable justification.

Under current Supreme Court doctrine, the only Equal Protection Clause distinction between racial discrimination and sex discrimination is that in order to justify the former, the state must show a "compelling state interest", while in order to justify the latter, the state must show that the classification in question is "reasonable". There is general consensus among attorneys that it is much more difficult to meet the former test than to meet the latter.

In this connection, I thought you and members of your staff might be interested in reference to a leading sex-discrimination case under the Fourteenth Amendment: *Brenden* v. *Independent School District*, 477 F.2d 1292 (8th Cir. 1973), in which the Court said:

> "There is no longer any doubt that sex-based classifications are subject to scrutiny by the courts under the Equal Protection Clause and will be struck down when they provide dissimilar treatment for men and women who are similarly situated, with respect to the object of the classification."

On the basis of this doctrine, the Court held that two female students could not be denied the opportunity to try out for the single tennis and cross-country teams being maintained by the school districts in question.

Title IX, as we read it, is simply supportive of the basic concept of the Equal Protection Clause, in saying that education programs which are *financed* by Federal funds may not be operated in a fashion which will discriminate on the basis of sex. As you are aware from our testimony, we believe that Title IX does not require, or for that matter permit, the establishment of a series of sex-*based* classifications such as those found in the athletic provisions of the HEW regulations purportedly promulgated pursuant to Title IX.

Very truly yours,

MICHAEL SCOTT.

Mr. BROWN. I agree with that. I would just offer for consideration one comment that goes back to a remark of the Chairman at the outset. The literal wording of the statute refers in singular terms to rule, or regulation, or section, and I raise for your consideration the question whether the law permits the determination by the Congress that one or more sections of the regulations are contrary to the statute while other sections are not. I believe such an interpretation would be consistent with this statute.

Mr. BUCHANAN. Thank you.

Mr. O'HARA. In other words, just because HEW chooses to send them up all in one batch doesn't mean the Congress has to treat them so.

Mr. BROWN. Exactly.

Mr. O'HARA. Thank you very much for your testimony, gentlemen.

Mr. FUZAK. I would like to thank you in behalf of our group for your courtesy and consideration and your willingness to hear what we had to say. Thank you very much.

Mr. O'HARA. Thank you very much, Dr. Fuzak.

Mr. O'HARA. Our next witness is Laurie Mabry, who is President of the Association of Intercollegiate Athletics for Women.

STATEMENT OF LAURIE MABRY, PRESIDENT, ASSOCIATION OF INTERCOLLEGIATE ATHLETICS FOR WOMEN, ACCOMPANIED BY GEORGE I. ANDERSON, EXECUTIVE DIRECTOR, AMERICAN ALLIANCE FOR HEALTH, PHYSICAL EDUCATION, AND RECREATION; LEOTUS MORRISON, PAST PRESIDENT, AIAW; MARGOT POLIVY, COUNSEL, AIAW; JOAN HOLT, PRESIDENT, EASTERN DISTRICT, AIAW

Ms. MABRY. Thank you.

Mr. Chairman and members of the subcommittee, may I introduce the other persons here with me. On my left is George Anderson, executive director of the American Alliance for Health, Physical Education and Recreation, and on my right, Leotus Morrison, last year's president of AIAW, our legal counsel, Margot Polivy, and the representative from our eastern AIAW association, Joan Holt.

We appreciate very much your invitation to speak to you. I would like you to feel free to ask any questions of the group.

AIAW was formed in 1971 to establish and administer intercollegiate athletic championships for women and to provide leadership and governance for women's athletics. Today AIAW has over 650 member institutions and offers a full program of intercollegiate championships for women from 4-year colleges and universities and junior and community colleges.

Last year a total of 51,000 women students participated in AIAW athletic programs in 20 different sports and over 440 of our 550 member institutions had students participating in one or more national championships for women.

AIAW maintains as its cardinal philosophical principle the belief that the focus of intercollegiate athletics should remain on the individual participant in her primary role as a college student. The primary justification for athletic programs in the college curriculum is, in our view, their educational not their commercial value. While AIAW has sought and encouraged spectator interest in its program—such interest is not the legitimate primary purpose of the intercollegiate athletic program.

AIAW welcomes the adoption of the title IX regulations and urges the Congress to permit them to take effect immediately.

Discrimination against women in education has been illustrated with thousands of individual vignettes and proven with hundreds of learned and empirical studies. The record of the extensive hearings held by Representative Edith Green when she was Chair of this subcommittee contains ample evidence of a historic pattern of discrimination against women in education. Nowhere in the entire educational program has this discrimination been more pronounced and pervasive as in the field of athletics.

In 1972 women received about 1 percent of the total intercollegiate athletic budget. Today, owing largely to the anticipation of title IX regulations, women's programs have increased 100 percent, and in

1974–75 women received about 2 percent of the intercollegiate athletic budget available for men. Many women's collegiate athletic programs have experienced substantial improvement in a relative sense but they are not yet able to accommodate even the existing interest.

It is anticipated that as opportunities are increased on the elementary and secondary level the demand for and interest in women's programs on the collegiate level will mushroom. The University of Maryland, for example, increased its women's intercollegiate athletic budget from $19,000 in 1973–74 to $25,000 in 1974–75; the men's program on that campus has a funding level of some $2.7 million according to its own statement. Ohio State provides a women's athletic budget of $43,000, and a men's budget of $6 million. Computing these percentages, they are much lower than the average we projected but those averages were computed in a very conservative manner.

Much of the debate over title IX and the regulations has focused on the athletic section. Some members of the male athletic community have made grossly exaggerated claims regarding the impact of the regulations upon existing programs. On the other hand, women involved in athletics and those who are not—see the athletic section of the regulations as a civil rights issue and a bellwether of the congressional commitment to equal opportunity for women.

While the regulations are not as strong as AIAW would have liked, we believe that they will stimulate the provision of expanded opportunities for women and to that extent they are consistent with the letter and spirit of title IX, the statutory directive.

It has been suggested that athletics and particularly intercollegiate athletics are beyond the reach of title IX. This, you have gathered today.

The record of Congress demonstrates that the coverage of athletics was contemplated when title IX was adopted. Senator Birch Bayh made specific reference to the inclusion of sports facilities and the record of Representative Green's hearings is replete with references to athletic programs. Any doubt as to Congress' intention to include athletics in the coverage of title IX was completely resolved by the directive in the Education Amendments of 1974 that:

> The Commissioner shall prepare and publish, not later than 30 days after enactment of this Act, proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in Federally assisted education programs which shall include, with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.

This provision in the Education Amendments of 1974 clearly establishes the fact that athletic programs are covered by title IX.

Athletic opponents of title IX do not publicly dispute the basic proposition that women should be provided equal opportunity, however some of their actions belie their public posture. Rather, they assert, that such opportunity will be provided at the expense of drastically cutting the men's program—and particularly the football program.

The football coaches and the NCAA representatives who have addressed the committee claim that the regulations go far beyond the intent of Congress and place athletics under the control of the Federal Government. I say this is not true.

Whether a particular athletic program is properly within the purview of title IX is a determination which must be made on the basis of the circumstances existing at each individual institution. If a program or activity does not come within the guidelines for inclusion already laid down by Congress and the courts, it, of course, would not be subject to title IX or the implementing regulations. What the football coaches are seeking is congressional absolution for the proposition that whether or not a particular athletic program does qualify under the judicial guidelines for determination of inclusion in title IX, they will be exempt.

Such a request distorts the sole purpose of these hearings—to determine whether the regulations promulgated by HEW are consistent with the statute. And there is nothing in the regulations pertaining to athletics which is inconsistent with title IX of the Education Amendments of 1972.

The intent is equal opportunity, the only control is that men and women will be assured access to that equal opportunity—whatever opportunities exist at a particular institution. The full range of options and choices for the institution continue to exist—for scholarships and recruitment or none, 1 sport or 25, 5 coaches or 30 coaches, 1 facility or 2, emphasis on football or not. All the regulations say is that when an athletic program qualifies for inclusion under title IX, the institution must assure equal opportunity for both men and women.

It has been argued to this subcommittee that the HEW title IX regulations will undermine the revenue-producing capabilities upon which some collegiate athletic budgets are dependent.

First, although given ample opportunity—3 full years—to do so in comments to HEW, no one, including the NCAA, has demonstrated with financial data that this would or even could result. To suggest now, as the football coaches who addressed you Tuesday did, that a moratorium on the athletic regulations should be declared pending such a study, is, in our view, simply a tactic to continue to withhold from women students their right to equal opportunity in one education program.

Second, the regulations promulgated by HEW provide substantial protection for contact sports such as football. Women are not required to be permitted to try out for male-only contact sports teams nor partake of the benefits afforded to men on those teams. We believe these provisions go substantially further in protecting the revenue-producing sports than is necessary. And while we accept the regulations as a start in the right direction, we see no danger to the big-time athletic programs.

Third, even if all of the fears voiced by the football coaches were well founded, they would amount to no more than a plea that discrimination against women be permitted to continue because it is profitable to men or institutions. AIAW finds this concept repugnant to the American commitment to equal opportunity and basic fair play. Discrimination against any group is always profitable to some other group—it is why it continues—but it is not a reason for Congress or HEW to permit it to continue when it violates fundamental Federal policy as reflected in title IX.

Lastly, the strong outcries by a few concerning potential loss of profits as a result of adopting these regulations tend to obscure the actual fact that only very few schools actualy show a profit on their athletic porgrams and less then one-fifth of the members of the NCAA clear more than expenses in even one sport. The NCAA itself estimates the current annual deficit of its members at about $50 million. Clearly, the implication that revenues from men's athletics support the women's programs is a gross exaggeration. Most athletic programs are supported by student fees—male and female—and general university operating revenue—derived from male and female taxpayers or contributors.

For example, this morning I read in "The Athletic Administrator," a magazine produced by the National Council of Directors of Athletics, that, in a survey of 95 Division I NCAA institutions and 20 sports, 40 percent of the relief and average of salaries in the program were from physical education and not supported by income from athletics.

There is presently a well-publicized move by the NCAA to institute wide-scale economies in intercollegiate athletic programs. The theory of this effort is simple and sound; that is, that if nationwide there is a deescalation of permissible expenditures in terms of number of scholarships, coaches, and other support services, then the quality of competition between colleges and universities will remain the same and bigtime athletic programs can be continued at less cost.

Real economy measures accomplished wholesale and nationally could provide sanity in athletic program costs, as a part of an institution's total educational offerings and offer no threat to any single program, while increasing profit for all. These measures would also find acceptance by faculty and student leadership of the institutions. The students, faculty, spectators, and the alumni all would receive the same thrills from the contests, identify with the institutions, and donate just as much as in the past. Sport is exciting; it is a part of our culture, and I'm a fan myself. However, at some institutions sport is out of perspective and its cost is unreal.

The theory supporting the economy effort within the NCAA is equally applicable and equally sound when applied to the implementation of the title IX regulations. In addition, there is every reason to believe that expanded women's intercollegiate athletic programs will also generate substantial revenues.

A couple of years ago, my own director of men's athletics indicated he thought in a very short time women's basketball would be the third largest income producing collegiate sport. I think this is a possibility. I think he may be right. It is not the basis for justifying its inclusion in the program of an educational institution, however.

Spectator interest is growing, and with expanded opportunities interest and skill among women is increasing dramatically.

I have discussed what the regulations will not do but what they will do is serve notice upon every college and university that programs for women must be provided and upgraded. No longer will public moneys, contributions, and student fees be utilized solely for the benefit of male athletes. Women must be provided the opportunity to participate as well as spectate. No longer will institutions be able to assign the pool to the women's swim team from 6:30 to 8:30 a.m., and reserve the choice time periods for the men's team. No longer will multimillion-dollar facilities be built to which women athletes are totally deprived access. Student-athletes, regardless of sex, are entitled to equal treatment as students even if they happen to be athletes.

The day is over when the Nation or I, as a women's athletic director, will say to a high school girl who inquires about a women's athletic program, "We can't help or provide for you, but if your brother is interested, we have lots of goodies for him." The women of this Nation believe this, and thousands of men agree. Many of the persons in the audience, for example, are members of the American Alliance for Health, Physical Education and Recreation. This Association represents over 50,000 members, men and women, who support equality of opportunity for all students, regardless of sex.

The title IX regulations also dovetail with the current reaction against the dehumanization of the athlete that has unfortunately exploited the student athlete as a source of cheap labor for the untaxed professional entertainment businesses operated in the name of some tax-exempt educational institutions. AIAW believes that all student-athletes, male and female, are entitled to no less consideration than every other student in the academic community whether he or she attends by paying fees or by scholarship.

It may be that in developing and expanding programs for women, colleges and universities will be encouraged to review their athletic programs and trim some of the excesses that have developed in the men's program. The current financial plight of colleges and universities points in that direction and for most, big-time athletic programs represent a net financial drain. We believe that such a review focusing upon the educational rather than the commercial values of intercollegiate athletics would benefit the institutions and the student-athletes.

Women are eager for equal opportunities in intercollegiate athletics, but to our mind that does not require that women's programs be a carbon copy of the men's. It is every bit as discriminatory to force women into the programs and patterns established by men for men, as to preclude participation of women entirely. Women must be permitted to develop and participate in athletic programs designed by them, for their needs and their interests. We believe this is the spirit of title IX and the regulations promulgated by HEW are a start in that direction.

Sandler and Dunkle in their excellent statements reprinted in the Congressional Record of November 1974—S. 19550—assert: "Differential treatment of men and women exist in almost every segment and aspect of our society. Perhaps it is the most damaging, however, when it appears in and is transmitted by the educational institutions which are supposed to provide all citizens with the tools to live in a democracy. As the U.S. Supreme Court said in the 1954 Brown decision with respect to race:

> In these days, it is doubtful that any child may reasonably be expected to succeed in life if denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms.

In the past 20 years it has become painfully clear that equal educational opportunity will become a reality only if it is supported by strong and vigorously enforced Federal legislation.

I made the comment one day to my university president when discussing the issue of athletics and the financing of programs for men and women, that "If morality is no basis for judgment in higher education institutions, then my choice would be to be out of education." I feel just as strongly about morality in government, as does the Nation, that moral judgments and actions must exist in government, and I believe Congress expressed such a judgment in the statute and will now reaffirm its intent of equal opportunity. Equal opportunity is the law of the land, and it should be enforced, and football will go on without harm, and I and others shall remain among its many sport fans.

For these reasons, we urge the Congress to permit the immediate effectuation of the title IX regulations. We trust that HEW will make those adjustments and amendments in the regulations necessary to assure equal opportunity for women in light of future experience.

On behalf of women and women athletes, I urge the full implementation of equal opportunity in all ways in this country. Make our concepts of freedom and opportunity real and within the reach of women.

I thank you for the invitation to present this formally, and welcome any questions you might have.

Mr. O'Hara. Thank you.

With respect to regulations, you, early on in your statement, had an observation that interested me. You had a number of them but this one in particular.

On page 4, toward the last paragraph on the page:

> Whether a particular athletic program is properly within the purview of title IX is a determination which must be made on the basis of the circumstances existing at each individual institution. If a program or activity does not come within the guidelines for inclusion already laid down by Congress and the courts, it, of course, would not be subject to title IX or the implementing regulations.

Do you have anything in particular in mind there? What possible kind of an athletic program might not come within the purview of title IX?

Ms. Mabry. This is my opinion, but there probably would be very few, in that most institutions do receive public support.

I might ask our lawyer to react to this since it is a legal question.

Ms. Polivy. I think the reference is to *Taylor* v. *Finch*, with which you are no doubt familiar. Taylor laid down guidelines about how HEW might include direct and indirect programs in cutting off Federal funds and in an evidentiary sense what showing would be necessary. The courts in the field of athletics have spoken in these terms, the argument that has been made to this committee by football coaches and to some extent by NCAA is they receive no Federal funding whatsoever, but that does not resolve the legal matter.

Mr. Hawkins, I think, made the point that the courts have interpreted direct and indirect funding, but if a program did not receive direct or indirect funding, such as Brigham Young University, title IX would not apply to that university. It would also not apply to the program. But I think this is an evidentiary question to be determined in each particular case.

Mr. O'Hara. I thank you. That clarifies the point.

With respect to the separate teams part of the regulation, section 86.41(b), it states:

> Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular

> **sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be able to try out for the team offered unless the sport involved is a contact sport.**

I am a little bit concerned about that particular portion of the regulations for reasons that have been expressed by a number who are interested in women's athletics and the implication of that seems to be that the institution need not maintain separate teams. That is to say, that if the institution wanted to have, instead of having a women's golf team and a men's golf team, just simply have a golf team and if it chose not to have a women's tennis team and a men's tennis team but simply to have a tennis team, and likewise with soccer, or whatever sport one might mention, that they could, if they chose do that.

Now, in your testimony, you suggested that it is true they might have to cut back some, as previous witnesses testified. I am wondering if that might not be one way that institutions could cut back under the regulations; that is, by getting rid of separate teams in a number of sports and instituting just one team, and I am wondering if you read the regulations that way, and, if not, where do you find justification for not doing so, and what the effect of it would be if you do read the regulations the way I do?

Ms. MABRY. I will respond briefly as the women's athletic director and refer it again to legal counsel, because it is a legal interpretation. But the total of the regulations are important here. For example, it is possible as I see it that there might not be a men's and women's golf team, but for an institution to adopt a pattern that it will have instead of teams all of which will be male, none of which will be training women except a few women who might qualify on the basis of skill, I believe this would be pure discrimination. I think you have to be realistic in that if women have 15 sports that interest them and men 15 sports that interest them, and an institution which can only support 15 sports, you must take from the 15 a mix that interests both men and women and come up with a sound program that meets the needs to the extent possible and meets the requirements of equal opportunity.

In other words, I don't think the regulations insist that any team that had more men, or any team had more women must be maintained for the opposite sex, but in total I believe the regulations to refer to a commitment to equal opportunity.

Mr. O'HARA. I am a little concerned, and I understand your point in looking at the totality, you favor the regulations, but you may have reservations about individual parts of them. I think that is a very large reservation, and I deliberately picked two noncontact sports of which there are numerous women participants in golf and tennis, I think, as athletic activities go, they are among the most popular athletic activities for women. So they have many participants. I think that is a possibility under the regulations. That is one way of cutting back. Of course, it might not be feasible for an institution to do that in terms of the public reaction to their doing so. But I think it would be within the regulations.

Ms. HOLT. I will not speak in terms of legality, because I am a coach and have worked in the field of athletics. It seems to me where equal opportunity is discussed in the regulations, if one will look at the section 86.41 (c) (1), it states: "Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."

Where we have been discriminated against in the past due to physiological limitations that women do have, we are not capable of getting a place on the men's team, and they then have an obligation, both because of the discrimination of the past and because of our competitive interests, that they would have to provide a separate team for the women in this case.

Mr. O'HARA. Well, I don't read 86.41(c)(1) that way. The way I read 86.41(c)(1) is that the thing they look at is whether or not the selection of sports and levels of competition take into account women's interests. For instance, I think there are some sports activities that are pretty nearly exclusively engaged in by women, to wit, field hockey, and they are saying, the way I read that particular subsection to refer to that sort of thing, that if there is interest in that paricular sport they cannot, in their selection of sports, have an ice hockey team, foı instance, and not have a field hockey team.

Maybe it should be read the way you read it, and I think it is not entirely clear, but I certainly understand the problem, and I do—you know, we are involved with the practicality of this, and your witnesses are people who are actively engaged in college athletics, the scheduling and operations, and you know some of the problems of it, and I think it is generally true, although not universally, that the use of athletic grants-in-aid is to direct, or it is heavily directed rather into the activities that produce the most revenue. That has been the pattern, and that it in a sense is a business judgment that is made in that case.

Ms. MABRY. May I respond?

I was hoping someone might bring that topic to the floor again. It is my opinion, and I think probably all of AIAW that business and commerce is not our purpose in athletics, but it is an educational program and if a sport, football or whatever makes profits, that profit should be utilized for the total program, men and women. And if, for example, it is a single program, it does not matter whether women produce profits or men produce profits, the point is they are students and they should benefit from whatever is available in terms of profit.

I think the day is going to come very soon when men who are coaches of minor sports will recognize the value of those sports and what they have coached and taught and are going to resist the notion that football is different and needs to be treated differently. Football makes money maybe for a few, but the money should be benefiting all in educational programs.

Mr. O'HARA. One of the prior witnesses said they think the sport that produces the revenue, men's basketball, or men's football, or whatever, should have first claim on the revenue and then the balance should be made available to each person. I think that was their contention, was it not?

Ms. MABRY. I think it was indicated by the coaches Tuesday that their profits provided for men only.

Mr. O'HARA. I think one of them did. There were eight of them, and the question went around, and it turns out that no two of the athletic programs were funded in exactly the same manner. One of them said that they had a men's athletic program and the revenue

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was used only for men's athletics. I think there was only one that was in that position of the eight here.

Ms. **Mabry.** Of course, the regulations are to initiate an opportunity for women which has been denied, and this is I think a poor illustration of what men's athletics is, in that 9 out of 10 are not in a profit position. Probably that gives them the benefit of the doubt.

Ms. **Morrison.** I would like to add one comment. All of us know that costs tend to escalate. And gross revenues will increase. I would think that exempting expenditures, will encourage even more spending by football and basketball or whatever group might be involved.

Mr. **Anderson.** I don't think there would be anyone who would disagree that any income produced by football or basketball should be used to underwrite the cost of that particular activity as long as the operation of that activity was in line with the operation of all other athletic activities. So that the amount of money that is allocated for scholarships, the amount of money allocated for uniforms, equipment, for the entire program was in line with the policies of all athletic programs in the school.

I think the question that comes up with whether or not certain programs of athletics should be allowed to have a different standard of operation in the program because they are revenue producing. If it is in line with the policies of the university or the college and all other athletics, then it is logical that the money should be used to cover these costs.

Mr. **O'Hara.** Well, let me ask a final question then. Dr. Fuzak was talking about their program at his institution, and he was saying that for instance they treat some of the men's sports quite differently. They don't award grants-in-aid or provide full-time coaching, or what have you to their fencing teams, men's fencing team, or to their lacrosse team, and I don't recall if he mentioned others, and they treat them a good deal differently than they do the football team, or the basketball team.

Now, what is your reaction to that?

Mr. **Anderson.** Your comment is supporting I think the idea I presented. I see no justification for treating a person who is on a fencing team or a swimming team differently in line with the policies of the university than it would be for the football or basketball team.

The fact that he has made that assertion is indicative there is discrimination, not between the sexes but among the students themselves whether they are men or women.

I think that is one of the things that the regulations are pointing toward, is equality, not just between men and women, but of all students regardless of their sex. I think that is the way the regulation reads. It does not mention sex, but it says "equally for all students regardless of their sex."

Now, I don't know if I answered your question.

Mr. **O'Hara.** Mr. Mottl.

Mr. **Mottl.** Thank you, Mr. Chairman.

Ms. Mabry, has your organization ever prohibited participation by the students with athletic scholarships in your competition?

Ms. **Mabry.** Yes. We previously had a policy which did not allow this. I might relate to a point that Mr. Fuzak was making in terms of women's athletics and their interests, which has changed according to him.

The point in that change, the act of changing our policy came about in terms of concern for discrimination toward women and that we were treating them differently. The original concern was that athletics, it is difficult to control, in terms of educational objectives that you want to accomplish, the costs with which you can operate, and scholarships have been a concern, that scholarships were a basis of those problems in athletic programs. That policy has now been changed and we do allow scholarships, and we feel opportunities should be equal.

Many of us still are not convinced that athletic scholarships and certainly to the extent they are available in men's athletics is good for athletics.

Mr. MOTTL. Do you favor such athletic scholarships?

Ms. MABRY. In terms of programs, I think it brings tremendous problems to it. In terms of women, they should have the same kinds of opportunities as men to have their education paid for.

Mr. MOTTL. Does your organization then favor athletic scholarships?

Ms. MABRY. Yes.

Mr. MOTTL. What restrictions do you impose on athletic scholarship awards? Are they the same as NCAA's, if there are any?

Ms. MABRY. No. Our policies limit by sports and treat all sports as relatively equitably, I mean by that tennis, golf, those kinds of sports are limited to 8 scholarships, whereas the larger participating types of sports, field hockey, swimming, and so forth are limited to 12.

But, in general, every sport is considered as important as every other one, and the limit is placed that way.

Mr. MOTTL. You have a limitation as to an amount for a particular sport?

Ms. MABRY. Yes.

Mr. MOTTL. So it does differ from NCAA's scholarship program?

Ms. MABRY. Our limits are different. Also the amount of coverage is, within our policies, tuition, room and board, fees, we do not allow the extra expenditure of money which is available through NCAA policies.

Mr. MOTTL. Has your organization ever prohibited admission charges at intercollegiate competition for women?

Ms. MABRY. No, it has not. Individual institutions may have set that policy.

Mr. MOTTL. But not your organization?

Ms. MABRY. No.

Mr. MOTTL. Does your organization favor the athletic recruitment of women athletes?

Ms. MABRY. Well, this is the same response I was giving as to scholarships. We think this is where the violations of education perhaps come about, including the extreme costs and misuse of scholarships, but we believe the opportunity should be available to women and that institutions must make a decision to the extent to which they want to be involved in this aspect of athletics or any other area of talent.

Mr. MOTTL. Do you support the provisions in regulations that compensation for coaches for men's and women's teams especially will be taken into account in assessing equality of opportunity?

Ms. MABRY. Do I support the concept that salary for jobs and so forth will be comparable?

Mr. MOTTL. For coaches for women's teams will be taken into account in terms of equality of opportunity?

Ms. MABRY. I certainly do, and if the jobs are comparable, by that I don't mean the pressure, but the time and number of students served, then I would support equality.

Mr. MOTTL. If so, then you do support that equality. Does your organization take the position that coaches of women's basketball teams, for example, should have no tenure and be hired and fired on the basis of their won/lost record, and should be expected to recruit outstanding athletes and be required to conduct the same kind of practice and plane schedules as coaches of men's teams in those colleges with major sports programs?

Ms. MABRY. We do not contemplate that for us or for men. We believe in educational programs and there are other bases to judge success than in merely winning, and we don't support it for either men or women.

Mr. MOTTL. All right, if you oppose any of these requirements I just mentioned, how can you say you support the regulations then?

Ms. MABRY. Well, does that mean we must change to the men's patterns?

Perhaps they may change to ours.

Mr. MOTTL. No, but this is what the regulations are saying.

Ms. MABRY. The regulations are saying men and women shall be treated comparably—is this what you point out?

Mr. MOTTL. Yes.

Ms. MABRY. But you are assuming I must support the men's viewpoint or operation. The point is we must make a decision and on some campuses it may be to deny women tenure and so forth, but that you know is the institution's choice. In this whole process, they may look at the practices in men's athletics and change them.

Mr. MOTTL. Would you favor that men playing on the girl's athletic teams should be allowed?

Ms. MABRY. I don't think this generally provides opportunities for women. There are exceptional women who can participate on men's teams.

Mr. MOTTL. What about men playing on women's athletic teams?

Ms. MABRY. I think if it is reversed, then the whole of title IX and its purpose in athletics would be defeated. That at this point there would be very few women participating in athletics.

Mr. MOTTL. The proposition as I understand, Ms. Mabry, by NCAA and the football coaches, is that if they have to cut into their funds for football and basketball which support many of the other athletic programs, not the University of Texas, and I think everyone brought up the one example by Darrell Royal, and that is an unusual example because most of the funds go to other programs to help support them, but if they have to cut down on the number of scholarships because they have to use these funds for women, it might bring some equality with women, but it will hurt the black male athletes who have a disproportionate amount of scholarships in football and basketball, so we might be helping in one instance but might be hurting with some discrimination on the other.

Ms. MABRY. My reaction to that is it might bring about some kind of support for female black athletes in this case.

Second, if there is true need, in most States, and certainly in my own, there is money available based upon need. This is a source of that kind of argument, to defend the procedures and practices in athletics and scholarships there for men. That argument has been uesd for a long period of time now.

These boys would not have gotten to college without this. But how many institutions look at this boy and say, "He is needy?" "I wonder if he is athletic?"

"If he is athletic, I am going to make sure he is needy."

Mr. MOTTL. Ms. Mabry, do you understand all the ramifications of the title IX regulations at this point?

Ms. MABRY. Possibly not all. I think we all have questions.

Mr. MOTTL. Don't you think it would be probably a good point if we have a moratorium for a while so all ramifications could be understood by male and female, so we know what might come about as a result of these deliberations?

Ms. MABRY. No, I firmly believe the 3 years in which we have attempted to finalize these regulations have been sufficient to have much evidence available which I think any one of us would be glad to provide for any Congressman interested, and I don't think a moratorium would serve a purpose.

I think the guidelines should be implemented immediately. Efforts to improve women's opportunities might be well studied after the fact, and we would join the NCAA in such a study. But to delay is merely a tactic I think to protect men's opportunities and the lack of benefits for women.

Mr. MOTTL. Even though you and your organization doesn't understand all of the implications, we should still implement it right away?

Ms. MABRY. I would ask my legal counsel to respond, because this is the kind of person on whom we rely in terms of understanding and full understanding of the regulations.

Mr. MOTTL. Thank you, Mr. Chairman.

Mr. O'HARA. Do you want to add something?

Ms. POLIVY. I would only suggest in any new set of regulations no one really claims to understand all of the ramifications. This is the reason administrative agencies are set up, and administrative rules promulgated and adjusted in light of future experience.

I think Ms. Mabry was trying to convey to you that in terms of the basic ramifications of the title IX regulations, we are secure in the feeling that we understand them in substance. There will always be questions, and we believe that is the reason Congress delegated to HEW the administration of these regulations.

Mr. MOTTL. Mr. Chairman, there have been serious allegations brought forth by the football coaches and also NCAA, that there are serious ramifications that intercollegiate football and basketball quality would be diminished greatly if these rules and regulations go into effect and would harm other sports on campus not only for male but female by not as much revenue going to those other sports, so I think there are serious consequences as a result, and whether they are true or not, I think we seek time.

Ms. MABRY. I sincerely believe that most men coaches would like to get out of what they are in and if the NCAA, for example, limitations and economies come about, the same relative standing is going to be there. It is not going to hurt men's athletics in any way. They are going to be perhaps spending a slightly reduced level, but the quality of competition will be the same, and I think this is a false concern they have expressed here.

Ms. POLIVY. I would also observe NCAA and the football coaches and the public at large were given more than ample opportunity by HEW to bring forward detailed comments. The coaches filed comments and so did NCAA, but nowhere in those comments has there been a financial analysis that shows why their assertions that this would undermine their programs is true. It has been their assertion.

I think after the total comment period, and after HEW has taken 3 years to come out with regulations, to now say that they should study it, is to say we now want HEW to do what NCAA failed to do for 3 years. They have asserted this will hurt their programs. We suggest it will not. They have never brought forth data to support the fact that this will hurt their program in any way. We think otherwise.

Mr. O'HARA. Mr. Buchanan.

Mr. BUCHANAN. Thank you, Mr. Chairman.

One of the reasons we tend to legislate in confusion around here is because we have so many arguments as to what the facts are which remain unresolved. Now, your testimony is in quite vivid contrast with that of NCAA as to what the facts are concerning revenue being produced by athletic departments and also what share of that revenue goes to women's programs.

On page 2 of your statement you say in 1972 that women's athletics received 1 percent of the total intercollegiate athletic budget, and in 1974–75 it was about 2 percent. The previous witnesses indicated that that is describing a situation that is no longer true, it is a good deal better than that.

I would appreciate any documentation you might provide in support of the 1- and 2-percent statements.

Ms. MABRY. We have lists with us, but taking the example of the Big Ten universities, of which I am a graduate of three of them, these institutions in the last 2 years have put money into athletics, but it has been in the last 2 years.

Ms. MORRISON. That is since title IX was enacted.

Ms. MABRY. As concerns title IX, the University of Illinois in my State has one of the poorest funded programs in the Nation, $3,000, while we, nearby, we fund at 10 times that. This is the Big Ten where big athletics for men have been available for many years.

Any money in there has been out of this, and out of real concern in terms of details of figures, I have them right here. By chance we happened to select some of these schools of the coaches of football teams here.

I recognize that these figures could have some misconceptions in them, but I think they are illustrative of what we talk about, in that some figures you get may be the salaries are not included, but the point they are not included for either so it should be relative. The University of Maryland, $2.7 million for men, and the women it is $22,500. Now, if you calculate that percentage, it is well below what we said, 2 percent.

University of Nebraska, it is $60,000 for women, and $4.1 million for men.

University of Texas, it is $2.4 million for men, and $78,000 for women.

University of California at Berkeley, $2.3 million, although women's sports in 1973–74 is $5.1 million and $120,000 for women.

I can go down the list.

Ms. **Mabry.** I would like, I know that is on tape, but in terms of completing it, there is one school I don't have the men's amount for. But the 2 percent figure we used in the formal response is from the Hanford study on intercollegiate athletics, which is a very reliable source.

Mr. **Buchanan.** This is a study by George Hanford on intercollegiate athletics, for the American Council on Education?

Ms. **Mabry.** Right.

Mr. **Buchanan.** He came to the conclusions that, as I understand it, institutions with a major commitment to big time sports will face financial difficulties for at least the next decade. I believe that was part of his conclusion.

This leads to a second area of questioning, second area of disagreement between you and the previous witness, as to profitability of the athletic programs. For example, you indicate in your statement on page 7, less than one-fifth of the members of the NCAA clear more than expenses in even one sport and the NCAA itself estimates the current annual deficit of its members at about $50 million.

I wonder if you would be good enough to provide documentation of that NCAA figure?

Ms. **Mabry.** Yes. That also is from the Hanford report, the $50 million, is that right?

Ms. **Holt.** Yes.

Ms. **Polivy.** I believe the NCAA supplied that figure in their press release.

Mr. **Buchanan.** Of course, the basic picture is whether the norm is to lose money or make money.

Ms. **Mabry.** Another quote, for example, and I will find the source—the Oregon athletic director said in the Washington Post, January, 1975, that he believed 100 of the 128 schools playing big time football have budgets in the red. This is coming from a male athletic director.

I think there is obvious documentation that the argument about profit and concern for it is an unsound one and lacks purpose when we talk about equal opportunity.

Mr. **Buchanan.** What do you ladies have to say about whether or not people can be as interested or not in watching women's sports? Do you have any response to that?

Ms. **Mabry.** Well, I think there were questions put to Mr. Fuzak about this. The point is that men's athletics for generations have been highly publicized, but there are many instances where there have been women's programs, the most commonly known being Iowa, where the girl's basketball tournament at the high school level draws a larger crowd than the boy's, and just last year, for example, the womens basketball teams from two institutions in AIAW, Queens College, and Immaculata, played in Madison Square Garden, and drew 12,000 people.

We had a letter from the manager indicating he has an interest in continuing such kinds of events.

I think there will be interest, but again this is not the point in determining equal opportunity for students in educational programs, but the interest will be there.

Mr. Buchanan. On this economic question again, do you have any idea as to how many schools like my own might have had to give up football? Football was too expensive for us to continue, very regretfully, but do you have an idea if that has been a trend or not?

Ms. Mabry. I have another quote; 151 senior colleges have given up football since 1939, but there was long concern about any women's athletics. Athletics is expensive and probably too expensive as it now exists.

Mr. Buchanan. Well, I think, Mr. Chairman, that given the fact that our function here is to figure out new and better ways to spend the taxpayer's money and given the importance of physical fitness to health, and the importance of human health to the country, that we have very healthy men and women populating this country, I am beginning to think maybe we need some new Federal programs to support physical fitness and athletics. Thank you very much.

Mr. O'Hara. I want to advise my friend from Alabama. I am not willing to put a nickel into intercollegiate athletics, maybe into intramural, so maybe we will be on different sides of the spending issue this time. I will be the economizer and you can be the big spender.

Ms. Mabry. I don't want to give the impression I didn't believe in the benefits of athletic programs. I think highly of them, obviously. I am saying that all of the good can come at lower cost.

Mr. O'Hara. I am a little concerned when you say your organization is not really against recruiting and athletic scholarships and so forth, but if men have them you think the women ought to, too.

It reminds me of Will Rogers' observation, "The rate things are going it won't be long," he said, "before women didn't know any more than men." And I am afraid that maybe is the direction in which we are headed.

So you are willing to adopt all of the vices of the men's intercollegiate sports situation?

Ms. Mabry. I think we are not willing to adopt all of the vices. What we are talking about is, if this is an opportunity to have your education paid for, women should not be denied it.

Between us I hope that with program changes can come sometime in both directions, and either direction, but to say we are moving into this pattern of athletics, I don't think women intend to do this. I hope that change comes about for all of us.

Ms. Morrison. Mr. Chairman, just to give you an example of what we are talking about. I think 105 is the total number of football scholarships or grants-in-aid the NCAA allows per school. AIAW's maximum in a comparable sport, which would be field hockey, is 12.

Ms. Mabry. Maybe the 13th girl someday may take us to court, but, in the process of institutions looking into it, they may begin to question 105 when 60 of those football players sit on the bench.

Mr. O'Hara. Sixty of them are not even on the team.

Ms. Mabry. Well, you mean the playing squad?

Mr. O'Hara. Yes.

Ms. Mabry. But the support in terms of scholarship and aid is well beyond that number, of course.

Mr. O'Hara. Thank you very much for your testimony.

Our last witness today is Jean Simmons, who is president of the Federation of Organizations for Professional Women.

STATEMENT OF JEAN SIMMONS, PRESIDENT, FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, ACCOMPANIED BY DONNA SHAVLIK, EXECUTIVE COUNCIL; JULIA LEA, EXECUTIVE COUNCIL, CHAIR COMMITTEE ON EQUAL OPPORTUNITY; IRENE L. MURPHY, EXECUTIVE DIRECTOR; AND JANE AUFENKAMP, ASSOCIATE DIRECTOR

Ms. SIMMONS. I have with me also Dr. Irene Murphy, author of "Public Policy and Status of Women," who is our executive director; Mrs. Jane Aufenkamp, associate director; Dr. Julia Lea, head of the task force on equal opportunity, and she has been involved in a detailed study of title IX; and Dr. Donna Shavlik, who is a member of our executive board.

I will read the statement.

I am Jean Simmons, president of the Federation of Organizations for Professional Women. By profession, I am a professor of chemistry at Upsala College in East Orange, N.J. I have been in higher education for more than 40 years as a student, faculty member, and administrator. I am here today to represent the views of the Federation of Organizations for Professional Women.

First, Mr. Chairman, I want to thank you for inviting the federation to bring the concerns of our member organizations to the attention of this committee. The federation, which was formed 3 years ago, is an umbrella organization of 64 affiliates with a wide range of professional identifications. Our purpose is to provide a mechanism for improving the status of women by promoting equality of opportunity in education and employment. Among our affiliates are the American Association of University Woman, the American Medical Women's Association, Graduate Women in Science, the National Association of Women Deans, Administrators, and Counselors, the Association of Women in Science, and women's caucuses in the American Political Science Administration, the Modern Language Association, and the American Economics Association.

The federation is deeply concerned about the lack of equal opportunity for women in our institutions of higher education and the continued failure of the Federal Government to implement fully title IX of the Education Amendments of 1972. In light of the focus others have placed on some very narrow aspects of the title IX regulations, I would like to review some of the broader issues: Why title IX was deemed essential in the first place, and why we believe these regulations meet the general objectives of that legislation.

The basic need for title IX stemmed from two factors: the extent of discrimination in educational institutions, and the level of Federal funding to those institutions. While discrimination against girls and women exists in every level of educational activity, in view of the responsibilities of this committee, I will confine my remarks to the situation in postsecondary education.

Systematic sex discrimination is pervasive throughout higher education in the United States. Every official institutional self-study that we know of has documented the existence of policies and practices that deny women full and equal opportunity to develop their talents. A sample list of these studies is appended to this statement. I would like to note here, however, a few of these reports to indicate that this problem is not confined to a few, small institutions. The studies come from a variety of universities and colleges and include some of our most prestigious institutions. Some of these studies are the following: a report of the chancellor's advisory committee on the status of women at CUNY, a report of the subcommittee on the status of academic women on the Berkeley campus by the committee on senate policy, and similar studies by official bodies at Harvard, Stanford, Indiana, Michigan State, Ohio State, the University of Washington, and Columbia University.

Despite documented discriminatory practices, these institutions continue to receive hundreds of millions of Federal dollars to support a variety of educational programs and activities. The substantial commitment of the Federal Government to the support of higher education is certainly well known to this committee. The variety of forms that assistance takes, as well as its magnitude, should be reemphasized.

The following data appear in "Federal Support to Universities, Colleges, and Nonprofit Institutions, Fiscal Year 1973, A Report to the President and the Congress," National Science Foundation, December 1974. In fiscal year 1973, $3.8 billion were obligated by the Federal Government to universities, colleges, and selected nonprofit research institutions. Funding mechanisms included research and development grants, general institutional grants, fellowships, traineeships, scholarships, research and development plant support, and money for facilities for instruction in science. Direct beneficiaries of this aid included both students and institutions. Students who receive this aid should be able to participate in all areas of university activities. Institutions which receive support are both directly enabled to provide certain teaching and research activities and are indirectly enabled to increase resources for all departments and activities.

I would like to add here that of deep interest to the federation is the fact that an analysis of Federal funding to higher education reveals that the largest research and development moneys are going to fields that have traditionally been the worst offenders in denying equal opportunity to women—the life sciences, physical sciences, and engineering.

The denial of equal opportunity on campus and the continued flow of Federal funds to support this inequity is not an issue that should be put off indefinitely. We most especially do not need delays, as was suggested by the coaches on Monday, to determine the impact of equal opportunity on college sports revenues. The Congress legislated on this issue 3 years ago. It stated that educational programs receiving Federal funds shall provide equal educational opportunity. It did not say this law will take effect only if it is convenient, only if it does not hurt anyone's revenues, or only if it does not rock the boat. Title IX was passed because it was recognized that the Federal Government should not support educational programs and activities that deny equal opportunity to one group of citizens.

While I have emphasized the immediate need for the title IX regulations, I should like to state now that the Federation would not support simply any regulations. We have carefully reviewed each draft of the regulations and studied the final product. Our review has convinced us, that despite some reservations, on the whole the regulations appear to comport with the basic objectives of title IX. Let me be more specific on those aspects that we believe make these regulations worthy of implementation.

First, the extent of the denial of equal opportunity in education and the level of Federal funding led us to conclude that the regulations must have broad coverage of insititutional programs and policies. We heartily endorse title IX's inclusion of employment practices, admissions procedures, physical education and athletics, grievance procedures, treatment of students, and financial aid. Because I should add, here these are all important factors in equal opportunity in the academic world.

Second, many of our members are educators, and they share the concerns of some on this committee that the title IX regulations might have the potential for great Government intervention in the internal affairs of universities and colleges. Two provisions, we believe, will reduce the need and/or likelihood of this intervention. These are the requirements for self-evaluation and for the establishment of grievance procedures. It is important to note that neither of these provisions dictates what form the self-evaluation will take, or what steps the grievance procedures must include. These are decisions left to the educational community. But, by including these provisions, HEW has probably cleared the way for institutions to set their own houses in order, to eliminate their own problems, and to deal, in-house, with charges of discrimination, without awaiting the filing of many complaints. The latter course would only lead to expensive Federal agency investigations or a further clogging of our already overtaxed court systems. I think the committee might take note, too, that the major educational associations, such as the NEA and the ACE, have already gone on record as recommending to their members that they institute grievance procedures as a good management practice.

I would add, parenthetically, we take it for granted that enforcement procedures in general would be strengthened and tightened as the need appears.

The federation is well aware that compliance with these regulations may not be easy. It will require changing traditional attitudes and policies, reconsidering resource allocations, and reevaluating the impact of institutional programs and policies on equal opportunities for both male and female students. But the test of equity has never been convenience. The test of equal opportunity has never been impact on revenues, or even impact on programs we have emotional ties to. The test of equal opportunity must be whether all affected persons are given a fair and reasonable opportunity to participate in and benefit from programs and activities receiving Federal support.

The Federal Government undertook expanded assistance to higher education because it was understood that a well-educated, trained populace was in the best interest of a democracy and that a reservoir of highly skilled technicians would be our strongest national resource. To support institutions which encourage the full development of only half our citizens surely cannot serve these ends.

[The appendix to the written statement of Jean Simmons follows:]

APPENDIX—INSTITUTIONAL ANALYSIS OF SEX DISCRIMINATION

"The Higher, The Fewer," Report and Recommendations of the Committee to Study the Status of Women in Graduate Education and Later Careers, Submitted to the Executive Board of the Graduate School, the University of Michigan, Ann Arbor, March 1974.

Chancellor's Advisory Committee on the Status of Women at CUNY, Public Hearings Testimony: An Edited Summary and Evaluation, September 1972.

Report of the Subcommittee on the Status of Academic Women on the Berkeley Campus, Report to the Committee on Senate Policy, May 19, 1970.

Lucy W. Sells, "Preliminary Report on the Status of Graduate Women: University of California, Berkeley," prepared for the Graduate Assembly's Committee on the Status of Women, March 30, 1973.

Lora H. Robinson, "Institutional Analysis of Sex Discrimination: A Review and Annotated Bibliography," ERIC Clearinghouse for Higher Education, The George Washington University, Suite 630, One DuPont Circle, Washington, D.C. 20036, June 1973.

University of California, Davis, Report of the Task Force on the Status of Women at U. C. Davis, June 1972.

University of California, Los Angeles, Report of the Chancellor's Advisory Committee on the Status of Women at UCLA. June 1972.

Carnegie-Mellon University, Final Report of the Commission on the Status and Needs of Women at Carnegie-Mellon University. November 1971.

Columbia University, "Columbia Women's Liberation" Barnard Alumnae 59 (Spring 1970).

Harvard University, Report of the Committee on the Status of Women in the Faculty of Arts and Sciences. April 1971. (This report focuses on the conditions of women students as well.)

Ferber, Marianne and Jane Loeb. "Rank, Pay, and Representation of women on the Faculty at the Urbana Champaign Campus of the University of Illinois." November 1970.

Hardaway, Charles W. "The Status of Women on the Faculty of Indiana State University." 1970.

University of Indiana, Bloomington, Study of the Status of Women Faculty at Indiana University, Bloomington Campus. January 1971.

Michigan State, A Compilation of Data on Faculty Women and Women Enrolled at Michigan State University. July 1970.

Ohio State University, Report of the Ad Hoc Committee to Review the Status of Women at the Ohio State University, Phases I and II. April 1972.

Stanford University. Siegel, Alberta E. and Ronald G. Carr. "Education of Women at Stanford University." The Study of Education at Stanford: A Report to the University. March 1969.

University of South Florida, Status of Women Committee: Faculty Report. November 1970.

University of Washington, A Report on the Status of Women at the University of Washington: Part II Undergraduate and Graduate Students. May 1971.

(All these reports are available either from the university or from ERIC.)

Mr. O'HARA. Thank you very much, Dr. Simmons, I appreciate having your testimony.

I have noted particularly your approval of the requirements for self-evaluation and for grievance procedures, international grievance procedures, and so forth.

As you know, these are provisions about which I am particularly concerned, because I do not find the statutory language in title IX that requires that sort of action on behalf of an institution, and I am wondering if you can point to some specific language that would require that?

Ms. SIMMONS. It seems to me, sir, this is a rather commonsense beginning to title IX. To begin by assuming that educational institutions are in a sense evil and sit around saying, "How can we discriminate against women?" does not seem to me a fair beginning for the application of any law.

I think we should be more optimistic about this and assume that educational institutions have proceeded largely through ignorance and through certain cultural factors in our society beyond which they have not looked. If they are given a beginning opportunity for self-evaluation, I think that they will note many of these things that they have simply not looked at in past years.

I therefore think this is a matter of practical commonsense not to begin as an adversary but to begin with sympathy for the educational institutions of our country.

Mr. O'Hara. It might make a great deal of sense, and it is really too bad that the Congress didn't think of it.

Ms. Simmons. I won't wish to reply on the exact legal points there. It seems to me that in any kind of regulation one has to proceed through what is the best way to implement the law.

Mr. O'Hara. That is precisely the reason that we are sitting here today, is because of the concern that I and many other Congressmen, Members of Congress have had, a concern that in drafting regulations to carry out laws enacted by Congress, the administration or the executive branch had, in effect, in legislating been supplying legislative omissions.

Ms. Simmons. I don't agree with you on that point, sir, if I may say so. It does not seem to me this is in disagreement with the purpose of title IX or even the expression of title IX as legislation.

It seems to me simply an explanation of how to go about fulfilling the purposes stated by Congress.

Mr. O'Hara. You know when Congress enacts a 55-mile-an-hour speed limit, we don't expect the Department of Transportation to come up with regulations that require every car to have a governor on it that would prevent it from going over 55 miles an hour. I think, well, maybe that is something we should have done, and maybe it would have been a good idea to do it, but in fact it was something we didn't do. We don't believe it is up to the Department of Transportation to correct our work. We think that we have to take our work as it is and do the best they can with it.

Ms. Simmons. I don't look upon this though as a correction nor do I agree with the analogy about the individual car.

Donna, would you like to make a comment?

Ms. Shavlik. My only comment is the language of title IX, not being specifically to the 55-mile-an-hour analogy, that part of title IX does provide for cutoff of Federal funds. I think it would be a tragedy if we, knowing there are policies in operation that could lead to cutoff of funds, did not assist the institutions in forestalling that eventuality which no one wants to see happen.

Mr. O'Hara. Mr. Buchanan.

Mr. Buchanan. Thank you, Mr. Chairman.

I don't have any other questions. I think all I will do is thank you for your testimony and inquire if there are areas covered in previous testimony to which you would like to respond or which you would like to supplement?

Ms. Simmons. I would like to say I am amazed at this disproportionate attention paid to a small area of athletics when I read title IX, which indeed is very broad, and it begins, "No person in the United States shall, on the basis of sex, be excluded from participation or be denied the benefits of or be subjected to discrimination under any educational program or activity receiving Federal financial assistance," and it goes on from there.

Certainly this is very broad. Why all of the attention is being fixed on athletics, I do not understand. And, as professional women, we are interested in professional development of women, and we feel that this is legislation and that these regulations cover this goal very well. Therefore, we are very interested in supporting it.

Speaking here only personally, I am also amazed at some testimony I have heard which relates to years of discrimination and then using that as an excuse for continuing it. It seems to me this is part of the old picture of victimizing the victim. How dare you be a victim? But you are, so we will continue to pick on you.

I have been very surprised at this. I have been surprised at the attention paid to whether a program has a gross profit. I think I would be equally surprised as to whether it had a net profit.

I have been engaged in budgeting and budgeting procedures in institutions of higher education. I don't know whether you know how budgeting procedures go in institutions of higher education, but sometimes they are very strange, and there is very little attention paid to programed budgeting.

I have seen, let's say the physics department, list its budget, take no account of salaries of people. I have seen them list programs in physics taking no account of overhead cost, no account of administration, related percentagewise, not taking account of the lights in their laboratories, and so forth, and when it gets to athletic budgets, I have seen the entire stadium left out and so on. So, to get actual statistics on this is very difficult.

To me that is beside the point. It does not seem to me anywhere in the law or regulations there is a point about "are we making money in this way?" So I have been amazed at the testimony.

Mr. **Buchanan**. One final thing, Mr. Chairman.

Would you comment on the degree of effectiveness of title VII toward the achievement of equal opportunity and the degree of need for the implementation of title IX?

Ms. **Simmons**. I would not want to decry the effectiveness of any title or executive order, or any part of the general material which pertains to equal opportunity. However, I think that title IX has something very badly needed, and again I say, representing an organization of over 1 million members, if you count the members in the affiliates, that we are interested in professional development of women, and we feel that title IX is the one title which will really be effective.

Mr. **Buchanan**. Thank you, Mr. Chairman.

Mr. **O'Hara**. Thank you very much, Dr. Simmons, and you associates for taking the time to assist the committee in its inquiry on the title IX regulations.

Ms. **Simmons**. Thank you very much.

Mr. **O'Hara**. The committee now stands in adjournment.

[Whereupon, at 12:45 p.m., the subcommittee stood in recess.]

SEX DISCRIMINATION REGULATIONS

MONDAY, JUNE 23, 1975

House of Representatives,
Subcommittee on Postsecondary Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 2 p.m., pursuant to recess, in room 2175, Rayburn House Office Building, Hon. James G. O'Hara, chairman of the subcommittee, presiding.

Members present: Representatives O'Hara, Brademas, Chisholm, Benitez, Blouin, Simon, Mottl, Hall, Quie, Buchanan, and Smith.

Also present: Jim Harrison, staff director; Webster Buell, counsel; Elnora Teets, clerk; and Richard Mosse, assistant minority counsel.

Mr. O'Hara. The subcommittee will come to order.

Today marks the third day of our public hearings on the regulations developed by the administration for the implementation of title IX of Public Law 92-318 and submitted to the Congress in accordance with section 431(d) of the General Education Provisions Act.

Our duty in these hearings is to examine the regulations, see if they are consistent with the law. We are not looking at the wisdom or convenience or efficiency or impact of the regulations. We are looking at them to see if they are consistent with the law from which they must derive all of their authority.

If they are consistent, and if we find that we don't like the law, we can of course recommend changes in the law. But that has nothing to do with the operation of these regulations until and unless the law is changed.

If they are inconsistent, even if they are the epitome of wisdom and high ideals, then they should be disapproved until and unless we change the law to make it a suitable basis for the regulations.

We have gone through a number of serious crises in this country in recent years and one of the most important has been the effort to make real the promise that women and members of minority groups will be able to participate fully and without hindrance in all aspects of our social, economic, and cultural life.

The enactment of title IX 3 years ago was another major step forward in the effort to make sex as irrelevant to participation and eligibility for programs as race, color, creed, and national origin were made by other legislation. Title IX originated in this subcommittee, and I don't have to call the roll to know that it would receive the same support here today that it received then.

But there have been other crises, too, in these past 3 years, and one of the gravest of these crises, every bit as grave, every bit as serious a challenge to our Constitution as the attacks upon human rights, has been the narrowly averted attack on the rule of law.

Surely we have learned in the past 2 years that however laudable the goal, we cannot trust in the limitless good will of Government, that the agencies that are charged with carrying out the law have an almost irresistible tendency to go beyond the law, and that we have to maintain constant vigilance to see that they stay within it.

And it seems to me that the obligation is equally as important whether the agency involved is the CIA or the OCR; the FBI or the HEW; the EEOC or the White House; the courts or the Congress. So it is with that in mind that we undertake the third day of these hearings.

Our first witness will be the distinguished Member from Texas, Congressman Bob Casey.

STATEMENT OF HON. BOB CASEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. O'Hara. Mr. Casey, we are very happy to have you before the committee today.

Mr. Casey. Thank you, Mr. Chairman. I deeply appreciate the opportunity to appear before this distinguished committee.

I am pleased to come here today to give you my thoughts on the proposed regulations promulgated by the Department of Health, Education, and Welfare to combat discrimination based on sex in the educational institutions of America.

Mr. Chairman, we are certainly agreed that discrimination based on sex is contrary to the provisions of our laws and should be prohibited. At the same time, I must differ with the regulations as proposed by the Department because I believe the means by which we achieve this goal are as important as the end we seek.

To summarize my viewpoint, I oppose the regulations as drafted, which require forced integration of physical education classes and a ban on single sex campus organizations established for honorary, professional, or service purposes. In these particulars, the regulations now before the Congress require substantial modification and I hope this subcommittee will consider such changes.

I would also point out that the Congress has already given recognition to the problem and that at the close of the 93d Congress we did take some corrective action. That action came in a great deal of haste, however, as it was added by the Senate as an amendment to a resolution establishing a White House Conference on Library and Information Services.

There was a great deal of caution used in the wording of the amendment on exemptions we made last year, perhaps rightly so, since full hearings had not been held on the matter. The exemptions made at that time were restricted to social fraternities and sororities, the YMCA, YWCA, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations.

There are obviously a good many other campus organizations which clearly deserve to be exempted from the provisions of title IX, not for any purposes of discrimination but to avoid discrimination.

The most glaring need for exemptions remains in the area of physical education and athletics.

The physical education regulations have obviously gone beyond the intent of Congress. These requirements, inconsistent with the Educational Amendments of 1972, broaden the power of Federal Government beyond its legitimate interest and, in fact, result in a form of discriminatory treatment between those within schools or on campus and those outside the educational system.

As the subcommittee knows, title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational institutions receiving Federal assistance. The specific provision reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." (Section 901(a), 20 U.S.C. 1681).

Pursuant to this law, the Department of Health, Education, and Welfare drafted regulations which were reviewed by the President. Following his examination of the Department rules, President Ford signed the proposed regulations which are now before this subcommittee for the review required under the statute.

As the very able chairman of the subcommittee, Mr. O'Hara, has pointed out, the Congress may approve or disapprove the regulations without comment or may make specific suggestions on the final rules.

The regulations themselves consider discrimination in numerous ways and in great detail. They relate to students, teachers, and administration and consider admissions, recruitment, equality in facilities, resources and course offerings, sports, scholarship and financial aid, employment practices, grievance procedures, and even the content of books and other educational materials.

The goals we have set for the Nation are laudable, but they should go no farther than the law, our Constitution, or the sentiments of our people will permit.

There can be little doubt that these regulations have gone beyond the intent of Congress in the matter of physical education classes and single sex campus organizations. The clearest statement on this issue among the authors of title IX was given by former Representative Edith Green, and let me say with great pleasure that she possibly will be testifying here before this very able committee on this subject.

As she noted November 26, 1974, on the floor of the House:

> "(Title IX) was never designed for the purpose of having the Federal Government intrude on private organizations and to force by Government fiat the integration of such groups as Boy Scouts, Girl Scouts, Campfire Girls, YMCA, YWCA, the Boys' Club, the Girls' Club, and all sororities and fraternities. It was never designed to have the Federal Government say to a sorority or faternity, whether it be social or professional, 'You have to do this or we are going to withhold all the funds from the university.'" (Congressional Record of November 26, 1974, at H11106.)

I would remind my colleagues that, in the course of the debate on the White House Conference on Libraries' resolution, S.J. Res. 40, which was debated at the close of the 93d Congress last year and which limited the restrictions applying here, the subject was not whether the limitations were too broad, but whether they were too narrow.

That was when the language was added to exempt social fraternities and sororities, Boy Scouts, Girl Scouts, and the few other specific organizations.

I remember that debate very well, in part because of my participation in it, and I know that many Representatives were concerned that the exemptions did not go far enough. It was the chairman of this committee, the very able Mr. Perkins, who assured me that there would be ample opportunity to extend the list of exempt organizations at a later date.

We were dealing with a conference report at that time and we were at the end of the session and late in the year. But the need is now more pressing than ever, and it is important that we exempt these organizations before these regulations become effective.

If any doubt remains as to what the real intent of the Congress is on this point, I would refer them to the Record of April 16 of this year. It was at that time that I proposed an amendment to H.R. 5901, the education appropriations bill, which would do exactly what I am proposing today: exempt campus organizations and physical education classes from the authority granted under title IX.

That amendment was specifically patterned after the language of Representative Green and the vote is there for all to see: 253 to 145. By nearly a 2-to-1 margin, that amendment was accepted by the House.

One of the major concerns remains: that the proposed regulations broaden the power of the Federal Government beyond its legitimate interest and are inconsistent with the provisions of the Education Amendments of 1972.

The clear statutory authority limits the Department of Health, Education, and Welfare to matters involving federally supported programs. Yet neither campus organizations nor physical education classes have received Federal educational assistance in any form. The plain meaning of the language of the law prohibits such regulation.

This provision of the law was patterned after title VI of the Civil Rights Act of 1964 and even a cursory reading of the cases interpreting that statute shows that some evidence of Federal assistance must be shown before the statute can be invoked.

I might say that this is a point of concern in many of the other areas which the regulations have touched on. For a discussion of the limited authority granted under an identical statute, however, I would urge the subcommittee to review *Board of Public Instruction of Taylor County, Fla. v. Finch et al.*, [C.A. Fla., 1969, 414 F2d 1068].

The final point I would like to make here is that, under the regulations as currently drafted, we are actually discriminating within groups. As American citizens, we all enjoy specific constitutional rights to assemble, petition, speak freely, and band together in matters of common interest. Under these rules, however, we are told that it will be far more difficult and unjust for single-sex organizations to exist while the members are still in school than after they have graduated. This is an irrational distinction.

There will be many witnesses before this subcommittee urging review of the various sections of the regulations. I would ask merely that you consider these rules with an eye toward the evil that was sought to be corrected.

Whenever a distinction exists that does discriminate in its effect, then it should be struck down in order to give all students equality of opportunity. But where the relation between the rule and unjust discrimination which denies equality of opportunity does not exist, then a change in the rule is in order.

Applying this standard, the rules relating to physical education classes and campus organizations clearly fail.

There is no doubt that gym classes can be conducted on a separate sex basis without harm or unfairness to the student. At the same time, requirements such as this will impose administrative and economic problems in many schools, particularly smaller schools, where the gym facilities were not constructed with mixed classes in mind. Separate showers, locker rooms, et cetera, will entail added expense and difficulties in much of my own district, and I cannot believe that it is warranted.

In addition, this is a basic administrative and curricular decision. This is the type of decision which has always been made at the local school district level in this country. For the first time, in my judgment, the Federal Government is entering into a clearly local matter.

No one would have objection to encouraging school districts to integrate their physical education classes. Most would, and in fact most already do so when feasible. Yet we should not start to make these decisions uniformly for the entire Nation at a level of government so far removed from the everyday administration of the actual programs.

The change I support would certainly not require school districts to segregate their physical education classes by sex. Many physical education courses readily lend themselves to mixed classes and most schools do have a certain number of physical education classes which are coeducational.

But all I ask, and I believe most of our colleagues agree with this view, is that we allow commonsense to prevail in these matters and that local school districts be allowed their traditional right to make these decisions.

With regard to single sex organizations on campuses, let me ask merely, "Who are we hurting?" Many a group established for service, honorary, or professional purposes has informed me of the need for some relief from this section of the regulations. I want to stress that it is not the male organizations which have approached me; it is the female service, honorary, or professional groups that are concerned. The reason is simple: many of these groups are concerned with problems or issues relating only to women.

They should be allowed to organize, and they should be allowed to organize on campus if they so choose. For myself, I can see no distinction whatever between such a group being established on campus or off. Yet one is prohibited and the other is not. I am afraid the difference exists only in the mind of the Department of Health, Education, and Welfare.

I am concerned, also, to learn from some of the groups coming within the scope of these rules that the Department is taking an attitude which borders on harassment.

They have advised some persons that a college or university may have all funds for all institutional sources cut off for such things as allowing the members of a single-sex organization to meet in a classroom after regular hours without the payment of rent, or to post messages on school bulletin boards without the collection of a fee, or to allow a faculty member to voluntarily serve as an adviser without charge.

The attitude is neither necessary nor productive. It is, as I say, harassment.

These organizations are proud of their past history and accomplishments. They exist to serve, to honor achievement or to advance the interests of their professions. The judgment as to whether such organizations should continue to exist in their present form is not one that we should concern ourselves with. When Government has gotten this big, I do not want to be a part of it.

Through the amendment we added last year, we gave recognition to the rights of certain campus organizations to restrict membership to one sex. All that we ask now is that we make it clear that the exemption be extended to all similar campus organizations so that there is no discrimination in application or interpretation of the law.

In conclusion, the proposals I make are minor ones.

They involve rules unrelated to the equal treatment of students in our Nation's schools.

They are irrelevant to the purpose of the statute under which these rules were formulated.

I certainly trust and I am sure that the committee will give thorough study to the effect of the proposed regulations of HEW.

Mr. O'HARA. Thank you, Mr. Casey.

I am going to have to cut the questioning short because, as you know, the bells are ringing for a vote. But let me quickly just make this observation. As you point out, they drew consistently on title VI regulations in adopting title IX regulations and they fell into the notion, it seems to me, which is appropriate for title VI regulations but not, I think, for title IX regulations, that separate is inherently unequal.

You know, the theory of title VI in the race discrimination cases is that as between two men, the only difference between them being the color of their skin, there are no real differences except pigment, and that any time you separate those two men or two women that may be inherently unequal, if you do it with deliberate intent of separating them.

But it seems to me that where you get the sex discrimination there is a problem, but it is a little different kind of a problem. There are in some cases fairly legitimate reasons why you might want to provide separate but equal facilities and classes and what-have-you.

What you are really saying is it ought to be all right for a school district to make that decision, that in some cases "separate but equal" makes more sense.

I would agree that these regulations take away too much of that authority, especially in the "phys. ed." area. I think there, with the differences between men and women and their size and their strength, and so forth, separate but equal facilities and opportunities does make sense.

Mr. CASEY. Well, I will agree with the chairman. There is one thing that I do think, though, that some are taking the attitude that you must spend the same amount of money on each particular physical education program, male and female, and I think that is a matter of need, not necessarily just as a matter of mathematics.

Mr. O'HARA. I have one question to direct to you at the request of Mrs. Chisholm. She has gone to vote, and you and I are going to leave in just a second. But she said:

In your amendment you called for the exemption of sororities and fraternities, whether honorary, service or social. And she goes on to say that she understands why you want to exempt the Girl Scouts, but sororities, social sororities and fraternities of a service or honorary nature, she points out, may well have a high correlation to employment or career advancement, and this is similar to the issue raised by women reporters with regard to the Gridiron Club. Why do you want them to be able to continue to discriminate on the basis of sex?

Mr. CASEY. Well, again, I think that is a matter for that particular organization. I can certainly see Mrs. Chisholm's point with reference to the Gridiron Club, but if Mrs. Chisholm were here I would be pleased to respond to her by saying that the ladies formed their own club and I haven't heard any of the men clamoring to get into it.

Mr. O'HARA. Well, they have, though.

Mr. CASEY. In fact they are outdoing the men with their programs.

Mr. O'HARA. Yes, but they integrated their club, and they now have men in it, men officers.

In any event, the Chair declares a recess, which will be over just as soon as Mr. Simon of Illinois returns and before I get back, so the hearing can continue.

Mr. CASEY. Thank you very much, Mr. Chairman.

Mr. O'HARA. Thank you very much, Mr. Casey.

The committee stands recessed.

[Whereupon, a brief recess was taken.]

Mr. SIMON [presiding]. The subcommittee will come to order.

Representative Goodling. Are you ready to testify?

We are happy to have a member of our committee testifying at this point.

STATEMENT OF HON. WILLIAM GOODLING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. GOODLING. Thank you, Mr. Chairman.

I don't have any prepared statement, nor do I have any great, overwhelming feelings in relationship to title IX. I guess my purpose for being here today is primarily one to caution Congress so that our involvement does not become one where we actually do more harm than good in trying to bring about nondiscrimination as it relates to sexes.

I would like to very quickly give a little background to my thoughts and comments.

When I became an educator 23 years ago, the major problem as I saw it in relationship to title IX was one of most of the principals and many of the superintendents of schools who were former coaches and former athletes. Most of the athletic directors were either the principal, or a coach and former athlete.

When I became an administrator in the late fifties and during the sixties, the first battle that we had to fight was to make sure that these administrators who were former coaches and these athletic directors who were former coaches and athletes did in fact realize that there were young ladies going to the schools also, who also wanted a piece of the action. Normally they would prevent this from happening primarily because they would indicate there were not sufficient facilities available to carry on both.

Now, we fought this battle and I think in many instances we won this battle, because at the present time in the systems I am familiar with, we have interscholastic athletics for girls in many sports, in fact most except the contact sports, and some of those I would say they participate in are pretty good contact sports also. But I am eliminating wrestling and football from that.

So my concern today is not one that should there be educational, coeducational classes in industrial arts—that has been going on in most areas, I think, where there have been younger educators for years; or whether there would be coeducational home economics, coeducational sex education or physical education classes.

These things have been happening more and more every year and, as I indicated, unless stopped by school boards younger administrators have been moving in that direction.

My concern is that we do not move blindly into the coeducational interscholastic athletic program so that all that we have done during the last 10 or 15 years goes to naught. I say that simply because if it becomes and if it is interpreted in such a manner—my State has been pushing this for 2 years—if it becomes interpreted that the only program that will be available will be a single program of coeducational athletics, and if we do not set quotas, and we certainly shouldn't set quotas because that would be discriminatory, then those 100 or 200 or 300 young ladies who have an opportunity to participate in interscholastic athletics may be denied that opportunity.

Or if we say that a certain number will be on let's say the varsity team of both young ladies and young men, and then in turn we say we will not deny a large participation by the girls, since perhaps only two or three would make a basketball team or a baseball team, then we may say that we will also offer a girls' interscholastic athletic program besides the coeducational interscholastic athletic program; then the boys I think would have a legitimate gripe to say that those who did not make the team of the coeducational team should also have a team that they can participate on that would be interscholastic athletics.

I think what I am trying to point out is it could become an impossible scheduling job. It could be a very expensive job, and eventually in the name of trying to bring about total coeducational programs in interscholastic athletics we may just undo what we have done during the last 10 or 15 years, and that is provide a pretty outstanding interscholastic athletic program for girls as well as boys.

I think basically that is my initial statement and that is what I would caution the Congress.

I read one statement I think in some of the mail that I have received, "We do not feel Federal regulations will further stimulate opportunities for girls, but rather cause confusion, frustrations, and expense for schools."

I think there is this possibility and we should guard very carefully the progress that we have made, in the last 10 or 12 years.

Mr. O'Hara [presiding]. Thank you, Mr. Goodling.

I might add a personal observation of the Chair that the witness, a member of our committee, has a daughter who is an outstanding tennis player, as those who have seen her in action know.

Mr. Brademas, do you have anything?

Mr. Brademas. Thank you, Mr. Chairman.

I have no questions. I want only to express my appreciation to our colleague and member of this committee and to say I do look forward to putting some questions to the distinguished junior Senator from Indiana, Senator Bayh, who I understand is shortly to testify.

Mr. O'Hara. Mr. Buchanan, do you have any questions?

Mr. Buchanan. Not at this time, Mr. Chairman.

Mr. O'Hara. Mrs. Chisholm.

Mrs. Chisholm. Thank you very much.

The Federal regulations per se do not require coeducational physical classes; would you say that?

Mr. Goodling. Yes.

Mrs. Chisholm. Well, then, what?

Mr. Goodling. My concern is what happens so many times, particularly with Federal regulations, the interpretation of those Federal regulations eventually down the line. This is my only concern.

My only concern is that we do not take away those things that many of us in the last 10 or 12 years have developed for girls in opposition to, of course, the entire male coaching staff in most instances, and in a lot of places the athletic director and in some cases the superintendent and the principal.

Mrs. Chisholm. But you would be in agreement with the basic premise that any kind of discrimination on the basis of sex and/or race with respect to any institution, collegiate or otherwise, receiving Federal aid or Federal assistance, is anathema to the basic concepts of equal opportunity, wouldn't you agree?

Mr. Goodling. Very much so. I agree wholeheartedly with that statement.

Mrs. Chisholm. Well then, wouldn't you say that when tradition is no longer the answer to the problems that confront us in today's society, that there is sure to be a certain amount of stirring, or certain amount of upheaval. Because those individuals who have been the beneficiaries of the status quo are likely to be the individuals who will be opposed to change.

All I am trying to say is that as we move into this new area, we are going to be meeting all kinds of upheavals and expressions of dissatisfaction. But this is part of the history of this country. It has occurred whenever the segments of the population which have been discriminated against ask for a share of the benefits that other segments have been receiving.

Now, it would seem to me that the regulations make it clear that, so long as the institution is in receipt of Federal aid it must comply. If the school or the university can show by substantive documentation that there is a separate administrative setup for the intercollegiate sports that they do not receive Federal funds either directly or indirectly, well, then these regulations would not apply to them. It would trouble us from the standpoint of a lack of a "moral obligation" but they would be exempt.

I am only trying to find out from you if you agree that any kind of discrimination on the basis of sex or race is antihuman in a democracy?

Mr. Goodling. Yes, I agree wholeheartedly with what you are saying and, as I indicated, my major concern is that in attempting not to discriminate we don't attempt to discriminate against women in interscholastics as we once did regularly on a regular basis, no matter where it was.

Mrs. Chisholm. I think the record would show that there have been a number of women athletes that have not been able to gain scholarships although they have done fantastic, outstanding work in athletics in this country, solely because of the fact that they were women.

I yield at this point. Thank you, Mr. Chairman.

Mr. O'Hara. Mr. Mottl.

Mr. Mottl. No questions.

Mr. O'Hara. Mr. Simon.

Mr. Simon. No questions.

Mr. O'Hara. Mr. Blouin.

Mr. Blouin. No questions.

Mr. O'Hara. Well, thank you very much for coming before us, Mr. Goodling. I appreciate the interest you have taken in this subject and I look forward to your active participation in our deliberations as we move ahead with these.

Mr. Goodling. Thank you, Mr. Chairman.

Mr. O'Hara. Our next witness will be a distinguished freshman Member of Congress from the Sixth District of Michigan, my friend Bob Carr.

STATEMENT OF HON. BOB CARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Carr. Thank you, Mr. Chairman, members of the committee.

I have handed the Clerk the full text of my statement, and would request that it be printed in the record in its entirety. I will attempt to give you a brief summary.

Mr. O'Hara. Without objection, your full statement will be entered in the record at this point.

Mr. Carr. Thank you, Mr. Chairman.

[The prepared statement follows:]

Prepared Statement of Hon. Bob Carr, a Representative in Congress From the State of Michigan

My concern in appearing before you today is to emphasize that women must be afforded options and alternatives in education which have too long been unavailable. The far-reaching potential of Title IX ought not be abrogated for the sake of a privileged few who wish to retain the use of our educational institutions for their special advantage. Yet this is what may be happening with Title IX.

I urge you to approve Title IX as written, despite its several weaknesses, so that implementation can begin. We cannot permit its effect to be further blunted through extended debate. Three years has been adequate time to produce a reasonable compromise on the guidelines.

The need for Title IX is abundantly clear. In Michigan, the State Board Taskforce to study sexism in the schools found discrimination in many facets of the K–12 program. It is a pattern that is also prevalent at the post-secondary level. For example:

In administration, there is only one female superintendent in Michigan schools. Women are only 17.5% of the administrators statewide although they comprise 64% of the instructional staff in the 625 school districts.

Among elected school boards in the state, women constitute slightly more than 25% of those holding office.

It has also been documented that female teachers are often not hired, despite better academic credentials because they cannot coach a varsity (i.e. male) sport.

A study of one Michigan school district found that only $1 was spent on women's athletics for every $8 spent on men's athletics.

The new career education thrust in Michigan has brought focus on the exclusion of women from shop, drafting, auto-mechanics, carpentry and other skilled programs as well as blatant stereotyping in career education materials beginning at the kindergarten level.

The stereotyping in instructional materials has been discussed with sufficient clarity in these hearings that I need not reiterate this. Let me only call attention to a single line in one well-used elementary reader: "She is just a girl, she cannot do this."

Routine classroom practices continue to be the most serious and will be the most difficult to amend. You can see separate lines of boys and girls waiting to begin class outside many of the elementary schools in my state. Similarly, there are separate drinking fountains, closets and toys. I have also seen separate reading lists for boys and girls.

Teacher attitudes also have a detrimental effect on a student's self-concept and aspirations. The teacher of a staff member's daughter actually refused to put the mother's proper title of DR. on an open house name tag, although she had done so for several fathers, because "that doesn't count for women."

The cumulative effect of these and myriad more instances of sex stereotyping in our schools can be defeating for many young men and women. The individual differences and capabilities of each person are often deterred by arbitrary expectations which do not suit the individual. We cannot continue to deny an equal educational opportunity to 51% of our population because they happen to have been born female. Our nation's well-being and the inherent rights of each American demand that we permit the development of our most valuable resource to its fullest.

This is not to deny that Title IX has deficiencies. There are many provisions that are legitimately open to criticism. I might cite as two examples, the extended grievance procedures which may effectively stall complaints at the institutional level and the exclusion of instructional materials from any strictures.

However, it is time for us to move forward with the initial provisions that are now before us for consderation. We as a Congress must be willing to put our full support behind stringent implementation of the Title IX guidelines and insist upon compliance. We must also be prepared to review these guidelines very carefully in the year ahead and recommend strong changes where "good faith" efforts fail. The guidelines are not perfect, but it is a beginning that is long overdue.

Mr. CARR. My concern in appearing before you today is to emphasize that women must be afforded the options and alternatives in education which have for too long been unavailable. The far-reaching potential of title IX ought not be abrogated for the sake of a privileged few who wish to retain the use of educational institutions for their special or particular advantage. Yet this is what may be happening with title IX.

I urge you to approve title IX as written despite its several weaknesses so that implementation can begin. It is long overdue. We cannot permit its effect to be further blunted through extended debate. Three years has been adequate time to produce reasonable compromise on the guidelines. The need for title IX is abundantly clear.

In my own State of Michigan, the State board of education task force to study sexism in the school found discriminations in many facets of the K-through-12 program. It is a pattern that is also prevalent at the postsecondary level. For example in administration there is only one female superintendent of schools in the State of Michigan. Women comprise only 17.5 percent of the administrators, statewide, although they comprise 64 percent of the instructional staff in the 625 school districts of my State.

Mr. Chairman, I won't go on to characterize the study; the actual characterization of the study is in my remarks. But the cumulative effect of these and other kinds of effects, more instances of sex stereotyping in our schools, can be defeating for many young women and men. The individual differences and capabilities of each person are often deterred by arbitrary expectations which do not suit the individual.

We cannot continue to deny an equal educational opportunity to 51 percent of our population because they happen to have been born female. Our Nation's well-being and the inherent rights of each American demand that we not prevent the fullest development of our most valuable resources.

This is not to deny that title IX has deficiencies. There are many provisions that are legitimately open to criticism, and I might cite two as examples. The extended grievance procedure I think may effectively stall complaints at the institutional level, and the exclusion of instructional materials from any strictures is a severe problem.

However, I think it is time for us to move forward with the initial provisions that are now before you for consideration. We as a Congress must be willing to put our full support behind stringent implementation of the title IX guidelines and insist upon compliance.

We must also be prepared to review these guidelines very carefully in the year ahead and recommend strong changes where good faith efforts fail. The guidelines are not perfect, but it is a beginning that is long overdue.

I might say in addition, Mr. Chairman, that my district, as you know, has a major university, Michigan State University. And I have heard many complaints that strict implementation of title IX in the guidelines is going to wipe out athletics as it is known at Michigan State University.

I have examined these complaints thoroughly and I find them to be essentially without substance. I don't believe that title IX or its strict enforcement by HEW will deter a good, healthy athletic program at Michigan State University; indeed, I think Michigan State University will benefit by title IX.

Mr. O'HARA. Well, thank you very much, Mr. Carr, for your observations.

Mr. Brademas, do you have any questions?

Mr. BRADEMAS. No; I want only to thank our colleague from Michigan for a very thoughtful statement.

I might just put one question to him, Mr. Chairman. He makes the point, if I read you right, Mr. Carr, that you believe that the regulations that have been supplied by HEW to implement title IX ought to be supported, but you feel nonetheless that there may be some deficiencies in those regulations. Is that a fair representation of your views?

Mr. CARR. That is right. I think that they are a mere beginning. I don't think they go far enough. But I don't think it is time to quibble. I think it is time to get underway.

Mr. BRADEMAS. And you do not feel that the regulations as proposed go beyond whatever the intent of the statute may be? I wasn't clear on that question, because you, at the bottom of page 3, cite a couple of examples, such as the extended grievance procedures and the exclusion of instructional materials from any strictures.

Now, the former, the extended grievance procedures, might fall within the categories of obligations imposed by the regulations that go beyond the statute, while the latter might run to a failure on the part of the regulations adequately to implement the statute; or am I incorrect?

Mr. Carr. No; that is a fair characterization.

Mr. Brademas. Thank you very much.

Mr. O'Hara. The gentleman from Minnesota.

Mr. Quie. No; I don't have questions.

Mr. O'Hara. The gentlewoman from New York.

Mrs. Chisholm. Thank you very much for appearing before the committee.

Would you say that there can be some kind of analogy that could be drawn between title VI and title IX? In the first place there is prohibition against racial discrimination; now here we come with title IX which addresses itself to the needs of another particular segment of people in this country who need to have some kind of redress for their justifiable grievances. Would you say that there is an analogy there?

Mr. Carr. Oh, I think that there is. I think it is one of the problem areas for people who are going to have to enforce the statute. One of the areas of improvement would be to make them exactly parallel and to make title IX conform with the requirements of title VI.

Mrs. Chisholm. All right, thank you very much.

No further questions.

Mr. Mottl. Mr. Chairman.

Mr. O'Hara. The gentleman from Ohio.

Mr. Mottl. Mr. Chairman. Thank you very much, Mr. Carr. We appreciate your statement. Are you familiar that Mr. Fuzak testified before the committee several days ago, and he is associated with Michigan State University.

Mr. Carr. Yes, I am not familiar with his testimony; however, I am familiar with the fact that he testified.

Mr. Mottl. His proposition to the committee was that, in behalf of NCAA, that if the present rules were allowed to go into effect, that intercollegiate football and basketball, the two revenue-producing sports for intercollegiate sports, could be hurt substantially, because under the present rules the proceeds derived from the gate receipts—I think Michigan State has about 75,000 seating capacity at their stadium, don't they?

Mr. Carr. That is correct.

Mr. Mottl. So substantial funds that come in from gate receipts from football and basketball at Michigan State could not be used—they would have to be used under the rules for women and men equally, thereby hurting the quality of their football and basketball not only at Michigan State but at other universities and colleges throughout this country of ours.

Consequently, they wouldn't produce as much revenue, so the other sports such as baseball, tennis, track, fencing, many other sports that are supported by football and basketball, would be hurt not only for male athletes but female athletes, because they couldn't have the income derived from the gate receipts.

Do you have any comments regarding Mr. Fusack's statement before the committee, Mr. Carr?

Mr. Carr. Well, not knowing his exact testimony, I am hesitant to counter it. But I would just say that in my own examination I found that there was a great deal of misinformation being put forth about the applicability of title IX and its regulations to the gate receipt sports.

There are abundant, and from my standpoint altogether too abundant, exceptions and exemptions in the regulations of title IX which allow athletic departments to operate by and large as usual. I think what we may find is that in some marginal instances where basketball teams are now getting the luxury of five separate uniforms, they may be down to two or three uniforms. It is going to perhaps take out some of the marginal money but it is not going to, in my opinion, affect the essential program.

I just might parenthetically add to my friend from Ohio that Michigan State University is threatened far more by Woody Hayes than by title IX.

Mr. Mottl. But, Mr. Carr, although you are threatened by Woody Hayes, and also Notre Dame University, in many instances, could the allegations proffered by the American football coaches who testified before the committee as well as the NCAA have some legitimacy to their charges that intercollegiate football and basketball as we know it today could be harmed by these rules?

Mr. Carr. I simply have to disagree with them. It is perhaps an argumentative point. I think that they are looking at the rules from the standpoint not where they are, which I think very lenient, but from where they think they may be going in the next 20 years, and they are seeing that 20-year window of reality as telescoped to tomorrow, and I think that creates a great deal of misunderstanding.

I think if we get title IX out of the athletic departments and into the counsel's office of the various universities that these fears won't be as prevalent.

Mr. Mottl. Thank you, Mr. Chairman.

Mr. O'Hara. Mr. Blouin.

Mr. Blouin. Mr. Chairman, I have no questions. I just want to commend the gentleman for speaking out in support of the rules. It is too easy in the Congress, I am afraid, to say that, you know, we ought to go along with the minor leagues of professional football and basketball and ignore the reality of the fact, and I am pleased to see someone here from our body that tends to agree with those rules.

Mr. Carr. Just so, Mr. Chairman, things have a parallel, we are also threatened by Iowa.

Mr. O'Hara. Mr. Benitez.

Mr. Benitez. Mr. Carr, I support for your statement, if I understand it correctly as I assess it, your position is that while the rules are deficient or inadeqaute at some points, you feel that on balance it is better to endorse them as they are and get them implemented rather than try and quibble or discuss some particular items of them and so it would advance in time with these words. That is your position?

Mr. Carr. That is correct.

Mr. Benitez. Thank you.

Mr. O'Hara. Well, thank you very much.

Mr. Buchanan.

Mr. Buchanan. I have no questions, Mr. Chairman, except to thank the gentleman for his statement, and tell him if he had to face Alabama he might really be threatened.

Mr. O'Hara. Well, I want to thank my colleague from Michigan for appearing before us. We enjoyed hearing from you.

Mr. CARR. Thank you.

Mr. O'HARA. The next witness is the Representative in Congress from the Third District of Alabama, the Honorable Bill Nichols.

Bill, would you please take your place at the witness table.

Mr. Nichols.

STATEMENT OF HON. BILL NICHOLS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. NICHOLS. Thank you, Mr. Chairman. I certainly appreciate the opportunity afforded me to appear before your distinguished committee this afternoon and to present, Mr. Chairman, a very brief statement on title IX of the Education Amendments of 1972.

Mr. Chairman, in coming before your committee I want to make it explicitly clear that I don't come here with the unbending attitude that title IX is all bad and that it should be disapproved in its entirety. I believe that many of the intentions embodied in this title are indeed very good, Mr. Chairman, and, for example, I support the proposition that women should have better opportunities to participate in college athletics and that they should receive a reasonable portion of athletic expenditures in the university to support their involvement.

But I come to you this afternoon, Mr. Chairman and gentlemen of the committee, as a member of the board of trustees of Auburn Univeristy, which is the land-grant institution in my State, to express some concern I have about certain portions of the rules which accompany this title and the impact that we at Auburn University believe that these rules will have on our institution and other institutions of higher learning in the State.

Some of the regulations, Mr. Chairman, seem to be based on the assumption that sameness and equality are synonymous. The housing provision, for example, section 86.32, is a prime example of this assumption. It states, and I quote: "A recipient shall not, on the basis of sex apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section."

Now, this provision would certainly seem to me, Mr. Chairman, to be saying that in order to provide equal housing, then, the facilities, the fees, the services, and the regulations all have to be identical, without regard to any difference in sex.

Auburn University has sought to provide equal housing to students by providing housing programs that do indeed recognize sex difference. One such program is the security of the dormitories, Mr. Chairman. Recognizing that young women are more often the target of molestation attempts than young men might be, greater security measures are enforced in women's dormitories at our institution than we have in the men's.

Now, title IX rules would not allow a university to "apply different rules or regulations * * * or offer different services or benefits." Thus, it would appear that the universities would be required to reduce the security measures of the women's dormitories to that that we exercise in the men's dormitories; or on the other hand, increase the security protection in the men's dormitories to that which we now have on campus for the women's.

Increasing the security measures in the men's dormitories would certainly require an unnecessary expenditure of funds at a time when every effort is being made to hold down costs. Housing costs, of course, are passed on to the student through rental charges. Thus, the student would be required to pay a higher fee.

The realization that equality and sameness are not synonymous has been recognized, Mr. Chairman, in the case of *Robinson* v. *the Board of Regents of Eastern Kentucky University*, U.S. Court of Appeals, Sixth Circuit, on March 28, 1973. In its ruling the court stated, and I quote:

> "Equal protection clause does not require identical treatment for all people. The States retain, under the Fourteenth Amendment, the power to treat different classes of persons in different ways. * * * This is a well-established doctrine, dating from soon after the ratification of the Fourteenth Amendment. Courts often have upheld State classification based on sex."

Mr. Chairman, I believe the logic followed in *Robinson* v. *Eastern Kentucky University* is very real and appeals to good common sense. Therefore, I would hope that title IX might be modified to embody this logic, especially with regard to the housing provisions.

I appreciate the opportunity to appear before you.

[The prepared statement of Representative Nichols statement follows:]

PREPARED STATEMENT OF HON. BILL NICHOLS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALABAMA

Mr. Chairman, I sincerely appreciate being given the opportunity to appear before this distinguished Committee to present my brief statement on Title IX of the Education Amendments of 1972. I do not come before this Committee with the unbending attitude that Title IX should be disapproved in its entirety by the Congress, for I believe some of the intentions embodied in this Title are good. For example, women should have better opportunities to participate in college athletics and should receive a reasonable portion of athletic expenditures to support their involvement.

However, as a member of the Board of Trustees at Auburn University I do have some concern about certain portions of the rules accompanying this Title, and the impact these rules will have on this and other institutions of higher learning in my state. Some of the regulations seem to be based on the assumption that sameness and equality are synonymous. The housing provision (Section 86.32) is a prime example of this assumption. It states that "a recipient shall not, on the basis of sex apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section."

This provision certainly seems to me to be saying that in order to provide equal housing facilities, fees, services, and regulations have to be identical without regard to differences in sex. Auburn University has sought to provide equal housing to students by providing housing programs that recognize sex differences. One such program is the security of the dormitories. Recognizing that young women are more often the target of molestation attempts than young men, greater security measures are enforced in the women's dormitories than in the men's. Title IX rules would not allow a university to "apply different rules or regulations . . . or offer different services or benefits." Thus, it would appear that the universities would be required to reduce the security measures of the women's dormitories to that of the men's dormitories. Increasing the security measures in the men's dormitories would require an unnecessary expenditure of funds at a time when every effort is being made to hold down costs. Housing costs are passed on to the student through rental charges. Thus, the student would be required to pay a higher fee.

The realization that equality and sameness are not synonymous has been recognized in the case of Robinson v. Board of Regents of Eastern Kentucky University, United States Court of Appeals, Sixth Circuit, (March 28, 1973). In its ruling the court stated, "Equal protection clause does not require identical treatment for all people. The states retain, under the Fourteenth Amendment, the power to treat different classes of persons in different ways . . . This is a well-established doctrine, dating from soon after the ratification of the Fourteenth Amendment. Courts often have upheld state classification based on sex."

Mr. Chairman, I believe the logic followed in Robinson v. Eastern Kentucky University is realistic and appeals to good common sense. I would hope that Title IX could be modified to embody this logic especially with regard to the housing provisions. Gentlemen, thank you for hearing my statement.

Mr. O'HARA. Well, thank you very much, Mr. Nichols, for a very apt statement.

In effect it is your contention that the equal treatment does not always involve identical treatment, and I think that is especially so when you are talking about sex discrimination. I am a little disappointed that the Office of Education did not see that that could be the case.

Mr. NICHOLS. Mr. Chairman, if you would indulge me further in an example of just what you have said, this question perennially comes up on campus at my university, of what rules we shall impose, if any, in girls' dormitories which would be different than those imposed in men's dormitories. The visiting privileges and the hours and the curfews, all this comes into perspective.

About a year ago, the question presented itself as to whether the university would permit weekend visiting privileges up until midnight on Fridays and Saturdays and Sundays in the girls' dormitories. It was a hot issue, Mr. Chairman.

So the board, thinking that we were acting in some degree of wisdom, elected to poll the parents of the young ladies involved who lived in the dormitories. About a fourth of our students live in girls' dormitories at Auburn University. To our surprise, we got back 81 percent of all the inquiries that we sent out—answered the inquiry. Of all those answering, 8[illegible] percent of the parents indicated that they did wish the present rules which would preclude this type of visitation to remain in effect.

This was not a popular decision on campus and, as you can imagine, we members of the board have gotten a good many letters back, but it would seem to be the sense of our feeling in our part of the country.

Mr. O'HARA. I thank the gentleman from Alabama.

The gentleman from Ohio, do you have any questions, Mr. Mottl?

Mr. MOTTL. No.

Mr. O'HARA. The gentleman from Minnesota, Mr. Quie.

Mr. QUIE. No, just to say to my colleague, Mr. Nichols, you raised some interesting points there. I am glad you brought it to our attention. Thank you.

Mr. O'HARA. The gentleman from Illinois, Mr. Hall.

Mr. HALL. No questions.

Mr. O'HARA. Mr. Blouin.

Mr. BLOUIN. No.

Mr. O'HARA. Mr. Simon.

Mr. SIMON. No.

Mr. O'HARA. Mr. Buchanan.

Mr. BUCHANAN. I would like to thank my colleague from Alabama for his contribution. You have brought up an aspect that has not been touched in previous testimony.

I am constrained to point out, Mr. Chairman, that we in Alabama are very proud of the gentleman's university. Although it has nothing to do with sex discrimination, Auburn has really accomplished some wonderful things; as a participant, for example, in development programs all over the world, accomplishing what Dr. Hannah of AID once said was a miracle in fish production. We are very proud of Auburn; Bill Nichols himself is one of their finest products, and I appreciate so much your contribution, I will say to my colleague.

Mr. O'HARA. Mr. Benitez.

Mr. BENITEZ. I was looking at the rules and regulations pertaining to housing.

Mr. NICHOLS. Yes, sir.

Mr. BENITEZ. And I noticed that it is indicated that a recipient may provide separate housing on the basis of sex. Then it goes on, says that housing provided by a recipient to students of one sex when compared to that provided to students of the other sex shall be on the whole proportionate in facilities, and so forth.

Now, where in these regulations is the specific provision to which you object?

Mr. NICHOLS. May I answer the gentleman in this way: We don't quarrel with what you have just read; we believe that dormitories ought to be equal, for men and for women. But we recognize that there are differences between the sexes.

Mr. BENITEZ. Yes.

Mr. NICHOLS. And I suppose, in answer to your question, we try to make up for those differences by regulation at the dormitory levels and insert restrictions, if you care to term them that.

Mr. BENITEZ. Yes. But what I am trying to identify, and as far as I can see from reading the regulations as they exist, I do not see in the regulations any provision that would preclude such adjustments as might be necessary in having some facilities for the girls that you don't need for the boys, or vice versa.

Mr. NICHOLS. We believe that the language which stipulates that the rules would have to be the same would indeed make a difference in the regulations that we might have on curfew and on the visiting hours, housemothers, and so forth, in the girls' dormitories vis-a-vis those that we might have in the boys' dormitories.

Mr. BENITEZ. But this pertains to the ones I have been reading, pertains to the propriety of making differences that are, we think, on the whole, similar; I mean this doesn't require an absolute uniformity—what it does require is reasonable equality, as I read it.

Mr. NICHOLS. We hope your interpretation is correct. But legal counsel that we have, and I believe you will find that this feeling is rather widespread among the universities across the country.

Mr. BENITEZ. But your concern, then, is not with the housing itself, but with the rules within the housing, such things as, you say, curfew hours, and so forth?

Mr. NICHOLS. Absolutely, sir.

Mr. BENITEZ. Thank you.

Mr. O'HARA. Thank you very much, Mr. Nichols. We appreciate your coming before us.

HON. PATSY T. MINK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF HAWAII

Mrs. MINK. Mr. Chairman and members of the committee, I thank you for this opportunity to present testimony on the question of whether the regulation promulgated for title IX of the Education Amendments of 1972 is consistent with the law. It is my strong belief that this regulation is indeed consistent with the law which we passed 3 years ago—and that we, as Members of Congress, should do nothing that might further delay the implementation of this much needed regulation.

It is well-documented fact that differential treatment of men and women exists in virtually every aspect of our society. Such different or discriminatory treatment is, however, the most pernicious when it appears in our schools and colleges—the very institutions which are charged with the heavy responsibility of providing our fellow citizens with the tools to live in a democracy. The words of Alexis de Tocqueville are as true in this, the 20th century, as they were in the 19th century: "[A] democratic education is indispensable to protect women from the dangers with which democratic institutions and manners surround them."

To disapprove the title IX regulation would merely serve to continue to deny girls and women access to the educational programs and activities that they need in order to function as effective citizens in our society. To approve the entire regulation is an affirmation of our commitment to equal opportunity for the girls and women of this country.

In making our assessment of the title IX regulation, it is vital that we look at who is supporting the regulation. While one might expect that educational institutions and associations would be the first to oppose such a regulation, the fact of the matter is that the major educational associations endorse the regulation. Here is a partial listing of the associations which support the regulation: Association of American Colleges, American Council on Education, American Association of School Administrators, Education Commission of the States, National Education Association, Association of American Universities, National Association of State Universities and Land-Grant Colleges, American Association of University Professors, American Alliance for Health, Physical Education, and Recreation, Association for Intercollegiate Athletics for Women, League of Women Voters, American Association of University Women, National Council of Jewish Women, Women's Equity Action League, Federation of Organizations for Professional Women, United Auto Workers, National Student Association, and the Intercollegiate Association of Women Students.

INTENT OF CONGRESS

Those who wish to see the regulation disapproved state that Congress did not intend for title IX to be applied broadly. However, the legislative history and debate on title IX belie this claim.

Throughout the debate on title IX, reference was made to the parallel nature of title VI of the Civil Rights Act—which prohibits discrimination against the beneficiaries of Federal funds on the basis of race, color, or national origin. At the time that this debate was taking place, it was clearly established that both the courts and HEW were taking a broad interpretation of coverage under title VI. The nearly identical wording of title IX and title VI can only indicate that Congress wished to ban sex discrimination in the same manner.

The testimony at the hearings on sex discrimination in education that Edith Green conducted in 1970 are replete with references to discrimination in a variety of areas, including sports opportunities and athletics—see, for example, pages 650, 664, and 678 of part 2 of the hearings. Similarly, sports opportunities or facilities are mentioned numerous times in the legislative history of title IX—see, for example, February 28, 1972, S. 2747; October 27, 1971, H.R. 37784; August 6, 1971, S. 13544; and February 15, 1972, S. 1769.

COVERAGE OF EMPLOYMENT

Some people claim that HEW has overstepped its bounds by including employment in the title IX regulation. This claim, however, does not hold up under examination. First, the language of the statute on its face refers to "no person," a designation which clearly includes both students and employees. Second, it is clear that Federal funds often provide direct employment, as well as indirect benefits to employees. Third, the legislative history of title IX indicates that employment was indeed covered by the broad mandate of the law for nondiscrimination on the basis of sex—The original House bill included an exemption for employment patterned after the exemption in title VI of the Civil Rights Act. The Senate version contained no such exemption, indicating that employment was covered. In conference, the language of the Senate version was adopted. Fourth, section 906 of title IX also deals with employment—by extending the coverage of the Equal Pay Act—indicating that title IX was not aimed solely at students but was intended to cover various employment situations as well. Fifth, although coverage of title VII of the Civil Rights Act regarding employment was extended to educational institutions in March of 1972, it was clear that, because of the massive backlog of the Equal Employment Opportunity Commission, additional remedies for employment discrimination were necessary. Hence, the coverage of employment under title IX is clear.

GRIEVANCE PROCEDURES AND INTERNAL SELF-EVALUATION

There has been some discussion that the requirements in the regulation for an internal grievance procedure and for a self-evaluation go beyond the regulatory making powers which Congress delegated to HEW. Such requirements are, in fact, administrative procedures which are in line with the mandate of section 902 of title IX: "Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity * * * is authorized and directed to effectuate the provisions of section 901 [the general prohibition against sex discrimination] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute. * * *"

Additionally, both of these requirements are in line with the process that a number of institutions have already initiated in order to eliminate sex discrimination on their campus. In fact, Dr. Nellie Varner of the University of Michigan—in testifying before this committee for the National Association of State Universities and Land-Grant Colleges, the American Council on Education, and the Association of American Universities—called the requirement for self-evaluation "the essential first step in the implementation of title IX," noting that this requirement "allows the institution to design and institute new policies and procedures which correct unwitting discrimination." With regard to the grievance procedure requirement, Dr. Varner's only objection to the procedure was that it did not go far enough—by not deferring HEW action until the procedure was completed.

OPPOSITION TO LAW, NOT THE REGULATION

A number of those people who oppose the regulation actually oppose the law itself. For example, those who oppose the regulation's requirement for coeducational physical education classes—except for instruction in contact sports—are in fact opposing the law, not the regulation. Similarly, those who maintain that single-sex honorary societies should be allowed to receive "significant assistance" from recipient institutions are asking for a legislative change: under the law that was passed, such honorary societies are prohibited from operation on campus and receiving significant assistance from the institution. Also, those who object to the housing provisions or provisions regarding rules and regulations are in fact objecting to the law that we passed. It is not the purpose of this committee to redraft the law or its coverage in this hearing process. Rather, it is our purpose to determine whether or not what HEW has drafted in consistent with the law that we did pass. And, indeed, the title IX regulation is consistent with the law we passed.

SCOPE OF COVERAGE

Certainly the most vocal group advocating disapproval of the regulation is the National Collegiate Athletic Association and its various affiliates, including the American Football Coaches Association. They argue that the scope of coverage under title IX is so limited as to reach only those programs which directly receive Federal financial assistance. I am attaching two excellent legal memoranda—attachments A and B—which forcefully rebut this argument, showing that the scope of coverage under title IX must be interpreted broadly.

The NCAA is also in effect asking for a wholesale exemption of intercollegiate athletic programs because some such programs may not be covered by title IX. Such an exemption would permit sports programs to continue to discriminate against women, even though they derive substantial benefit from the Federal dollar. Whether or not any individual intercollegiate athletic—or other—program is within the purview of title IX depends on the individual circumstances at each institution. If indeed a program or activity does not come within the scope of title IX as outlined in court decisions and by the Congress, it would not be subject to either title IX or the implementing regulation. To allow all intercollegiate athletic programs as—well as other programs—to discriminate against women because a few might be exempt from title IX is a clear denial of equal opportunity for our daughters.

It is difficult to trace the Federal dollar precisely. A narrow interpretation of title IX would render the law meaningless and virtually impossible either to enforce or to administer. For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of Congress to prohibit sex—or race or national origin—discrimination in the room with the title I projector, while allowing it in the adjacent room. Surely we do not want HEW investigators to be charged with tracing exactly which classes used the federally funded slide projector.

Also, if this narrow interpretation of the scope of coverage were accepted for title IX, it might well be the wedge in the door for cutting back protection of racial and ethnic minorities under title VI of the 1964 Civil Rights Act. Such a narrow interpretation could open the floodgates for reversing 11 years of progress under title VI.

INTERCOLLEGIATE ATHLETICS

The NCAA also argues that because intercollegiate athletic programs may occasionally make a profit, they should be given special consideration. The implication is that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from title IX. In this argument, the NCAA is disagreeing with the law, not the regulation. Our purpose here is not to relegislate. Rather, it is to determine if the regulation is consistent with the law we passed 3 years ago.

I might add, however, that I question the appropriateness of an educational institution running semiprofessional teams. We do not ask the National Football League to run an educational program.

Additionally, the practical facts of the situation also do not support the claim that big-time athletic programs make money. The NCAA itself estimates that the current annual deficit of its members is also $50 million. If the mandatory student fees that finance most big-time college sports programs were subtracted out and the numerous hidden costs—such as the bond issue on the stadium, field maintenance, training equipment, et cetera—were added in, the deficit might well be twice that. The data overwhelmingly support the contention that big-time college sports are—with or without women's athletics—in serious financial trouble.

A 1974 American Council on Education report on intercollegiate athletics states that institutions with a major commitment to big-time sports will face financial difficulties for at least the next decade—in fact, at least 151 senior colleges have given up football since 1939.

At least 9 out of 10 college athletic departments run at a deficit, according to a March 15, 1974, New York Times story. Rising costs and lessening revenues have undoubtedly even further reduced the number of schools making a profit.

According to Oregon athletic director Norval Ritchel, "The numbers [money] game is killing the less successful programs." He said that he believes that about 100 of the 128 schools playing big-time football have budgets in the red—and football is the sport most likely to generate a profit.

Less than one-fifth of the members of the NCAA clear more than expenses in even one sport.

Given these grim financial facts, the NCAA proposal that their profits be shared by female and male teams alike rings hollow. All female teams and the minor men's teams have suffered from the deficits of the big-time men's programs for years—indeed, as Mr. Royal of the University of Texas made quite clear in his testimony, the profits from his football team have only been used to support men's—not women's—sports. Under the title IX regulation that we have before us, although this pattern may change slightly, it will probably not change drastically.

The NCAA claims that the title IX regulation will be the death knell for men's intercollegiate athletics—specifically football and basketball. Although some educators might wish that this was so, it quite simply is not. The regulation promulgated by HEW in fact exempts the so-called revenue sports under the "contact sports" provision. Football and basketball are exempt, scholarships in those sports are exempt to the same degree, and there is no requirement of comparability for women. It is clear that HEW has bent over backward to protect these sports. While this is a step in the right direction, the title IX regulation poses no real threat to big-time men's intercollegiate athletic programs.

We cannot in good conscience continue to allow our educational institutions to deny women and girls the educational opportunities that have been the assumed right of their brothers. The title IX regulation provides a start in the direction of providing equal educational opportunity regardless of sex. I urge the Congress to demonstrate its commitment to equal educational opportunity by allowing the title IX regulation to take effect in its entirety on July 21, 1975. Such an action would be consistent with the spirit of International Women's Year and would serve to reinforce the principles of equal opportunity upon which this country was founded two centuries ago.

Mr. O'Hara. Senator Bayh, if you will please take your place at the witness table.

Our next witness is the distinguished junior Senator from the State of Indiana, the Honorable Birch Bayh.

Senator, I want to begin by expressing my pleasure that you as the Senate sponsor of title IX who played a very important role in its enactment have taken the time to appear before this subcommittee.

Second, I want to tell you that I have read your statement and I am very impressed with the scholarship and the effort that has gone into its preparation.

Third, I am going to ask my colleague, the ranking member of the subcommittee, Mr. Brademas to introduce you and then I am going to ask him to take over the gavel because I am going to have to be absent myself for a little while. But I did want you to know that I have read your statement and it is a very impressive statement.

Mr. Brademas.

Mr. Brademas. Thank you very much, Mr. Chairman.

I am very pleased to welcome to this committee a good and personal friend and colleague from the other body who has served for many years now as distinguished junior Senator from my State, and who I think has compiled for himself a record of great distinction as the author, I suppose it is fair to say, of more amendments to our Constitution than any other person since Thomas Jefferson, one of which includes the equal rights amendment.

I am also delighted to welcome him here today because I know of his long concern with the problem addressed by title IX, and because it gives me an opportunity, all too rare to welcome to this committee, present to my colleagues on this committee, a person who I for one am convinced, although he has already given great service to our country, may hold promise of giving still further service in positions of even higher responsibility.

Senator, we are very glad to have you with us today.

STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator Bayh. Thank you very much, Congressman Brademas.

I would like to put that last statement to rest. We have nine new Congressmen, and I don't care to usurp any of that additional responsibility that they are carrying very well. I appreciate your very thoughtful introduction.

I am wondering, very frankly, how I can best express myself without unnecessarily belaboring the committee.

Over on our side we have a temptation to take a 10-minute statement and extemporize on it for about 20 minutes. Perhaps it would be best, although I really don't enjoy doing this, if I would confine my testimony to some of the written testimony and then summarize the rest of it.

Mr. Brademas. That would be fine.

Senator Bayh. And then throw it open for questions.

Would you have any objection, Mr. Chairman, if Miss Barbara Dixon who did the staff work on this joins me?

Mr. Brademas. Not at all.

[Prepared statement of Senator Bayh follows:]

Prepared Statement of Hon. Birch Bayh, a U.S. Senator From the State of Indiana

Mr. Chairman, as the Senate sponsor of Title IX, I want to take this opportunity to testify before your committee on this, the third anniversary of the Congressional enactment of this landmark legislation. While it is indeed unfortunate, Mr. Chairman, that it has taken three long years for the Department of Health, Education and Welfare to promulgate regulations to enforce Title IX, it is my sincere hope that the Congress not add further to this delay by disapproving the regulations and returning them to the Department of HEW as is our statutory option during this 45 day period.

When I first offered Title IX on the floor of the United States Senate, discrimination against women in all levels of education—elementary through graduate—was rampant. This pernicious discrimination took many forms—quota levels in admissions, inequitable scholarship aid, discriminatory course offerings, and biased counseling to name but a few. In order to rectify these clearly discriminatory conditions, the Congress wisely passed Title IX of the Education Amendments on June 23, 1972.

Unfortunately, in the three years since the Congress enacted Title IX, the situation for women in education has improved only minimally. Current statistics on admissions to professional schools show that in 1972 only 12 percent of all students admitted to law school and only 16.8 percent admitted to medical school were women. I might add, Mr. Chairman, for those who would point out that fewer women than men applied to law and medical schools, that it is a persistent pattern of discrimination from the time a youngster enters nursery school that results in men realizing a higher level of education, on the average, than women.

Schools, Mr. Chairman, continue to be the primary vehicles in our society for socialization and career motivation. To the extent that the school system treats women as second-class citizens, inferior to their male classmates, and less worthy of expenditures of educational resources, women will continue to occupy the lower economic strata of the society.

While homemaking may still be the main occupation of American women, it is no longer the only occupation or source of identity for most of them. A majority of young women today will work—and will work in economically disadvantaged jobs. It has been estimated that over half of today's high school girls will work full time for up to 30 years, and 90 percent of these high school girls will be employed for other significant periods of time. Many of these young women will be the primary breadwinners for their families. Statistics released by the Department of Labor indicate that 40 percent of the 1.8 million families with incomes below the poverty level were headed by women. In the job market these women will be facing an earnings gap between similarly employed men of more than 43 percent. Unless major changes are made in the educational options and opportunities for women, a vast majority of these women will find themselves doomed to limited, low paying and marginal employment.

The Title IX regulations released by the Department of Health, Education and Welfare will not provide a change in the dismal picture of educational opportunities for women overnight, but they will mark an important first step.

As the Senate sponsor of title IX, I had hoped the regulations might be more demanding of our educational institutions in order that we achieve the equality in education mandated by the Congress. Portions of the regulations that were particularly disappointing to me included the Department's modification of the contact sports requirement which shifts the burden of proof for "substantial interest" onto the shoulders of those young women who would like the opportunity to play basketball, hockey, or any other contact sport.

While the regulations are disappointing in some respects, on balance the regulations do make significant strides in mandating equality for women. The heart of these guidelines is the prohibition of the thwarting of equal opportunity for female students and teachers at any educational level. The Title IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, and in the case of teachers and other educational personnel, employment, pay and promotions. We have waited three full years already for implementing regulations. Therefore I am urging the Congress to adopt the regulations without any further delay.

Negative reactions to the Title IX regulations—those which would urge a Congressional resolution of disapproval—appear to me to be based on a set of assumptions and myths about the regulations which have no basis in reality.

I. DEFINITION OF PROGRAM

One objection to the Title IX regulations questions the scope of the statutory intent of the Congress in passing Title IX. This objection centers on the interpretation of the enforcement of Title IX with regard to the termination of funds to "an education program or activity". Those who voice this objection feel the current regulations go far beyond the Congressional intent by attempting to regulate or enforce Title IX with respect to an entire educational program or activity of an institution as distinct from the more narrow, and according to these critics, proper definition of program as a particular federal grant program found to be in specific non-compliance with Title IX.

In maintaining that the proper Congressional intent was the narrow definition of program, the critics are making the assumption that the scope of Title IX and its enforcement requirements are distinct from those of Title VI of the Civil Rights Act of 1964, prohibiting discrimination on the basis of race, color, religion or national origin in all federally assisted programs. This assumption is totally inaccurate and I would point to my statements on the floor of the Senate on August 9, 1971, and February 28, 1972 CR S. 13550 and CR S. 5807). If I may quote briefly from my statement on the 28th of February.

"Central to my amendment are Sections 1001 to 1005, which would prohibit discrimination on the basis of sex in federally funded education programs. Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by Title VI of the Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and *enforcement* provisions which generally parallel the provisions of Title VI."

In addition, the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI.

Since the Congress intended the same statutory scope for Title IX as for Title VI, we can understand the concept of program and activity by looking to the Court's interpretation of the term "program" under various decision relating to the proper scope of HEW authority under Title VI. In *Bossier Parish School Board* v. *Lemon* [370 F. 2nd 847, 5a, 1967], the Fifth Circuit referred to the scope of Title VI as follows:

"Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdraw of Federal assistance . . . The Bossier Parrish School Board accepted Federal financial assistance in November 1964, and thereby brought its *school system within the class of programs subject to section 601 prohibition against discrimination*".

More importantly, this interpretation was clearly upheld by the Supreme Court in its recent decision in the case of *Lau* v. *Nichols*, 94 S. Ct. 786 (1974). In its decision the Court held that the San Francisco Unified School District was in violation of section 601 because non-English speaking Chinese students were being denied a "meaningful opportunity to participate in the educational program". The Court held that section 601 was applicable because "that section bans discrimination based 'on the ground of race, color or national origin' in 'any program or activity receiving Federal financial assistance'."

Three Justices concurred, relying not on Title VI itself, but on the scope of HEW's guidelines and regulations promulgated under it. In doing so, they found that the conditioning of federal aid to public schools on circumstances within the education program offered by the school district was within the authority of sections 601 and 602. The guideline used the term "program" in its broadest sense.

"Where inability to speak and understand the English language excludes national origin minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students."

The singularly most important case in establishing the definition of "program" under Title VI has been, *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F. 2d 1060 (5th Cir. 1969). Under the decision, the 5th Circuit has held that discrimination should be judged on an individual program oriented basis, however, the Court specifically stated that such a requirement does not mean that each program must be considered in isolation. Specifically the Court held:

"To say that a program in a school is free from discrimination because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory . . .

"If funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, the termination of such funds is proper. But there will also be cases from time to time where a particular program within a school (in short, within a political entity, or part thereof) is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others . . . In this way the Act is shielded from a vindictive application."

Title IX, as in the case of Title VI, clearly gives the Department of Health, Education, and Welfare the responsibility to enforce its regulations with regard to prohibiting discrimination based on sex in all aspects of the school program and to cut off funds where a program is being administered in a discriminatory manner or where it is affected by discrimination elsewhere in the school program it becomes discriminatory.

II. COVERAGE OF ATHLETICS

The second major objection to the proposed regulations concerns the application of Title IX to athletics.

Those maintaining this position argue that (1) the scope of Title IX is narrow and defined only to include those education programs that received direct federal financial assistance, and (2) since athletics is not an educational program in direct receipt of federal aid, Title IX cannot and should not apply.

This objection to the coverage of programs which receive indirect benefits from federal support—such as athletics—is directly at odds with the Congressional intent to provide coverage for exactly such types of clear discrimination. For example, although federal money does not go directly to the football program, federal aid to any of the school system's programs frees other money for use in athletics.

Without federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to federal financial assistance. If federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it. The Court in *Finch* equated "program" with grant statute, but it did not foreclose including within a program all the activities "benefited by the grant statute through the freeing of funds." This position was further elucidated in a recent *Texas Law Review* article (*Texas Law Review* v. 53, December, 1974). According to James C. Todd:

"Some Title VI cases support this interpretation by analogy. *McGlotten* v. *Connally* held that granting tax exempt status to private fraternal orders and allowing tax deductions for contributions to them was sufficient to bring those groups within the embrace of Title VI. In *Green* v. *Kennedy* the Court noted that a tax exemption for segregated private schools might be considered financial support to the extent that it was instrumental in releasing money for discriminatory programs. Those two cases therefore suggest that discrimination should not be tolerated in programs benefiting indirectly—by favorable tax treatment—from federal financial assistance. Other cases have also spoken of tainted programs. In *Finch* the Court warned that even if a program is not itself discriminating, it can still be 'so affected by discrimnatory practices elsewhere in the school system that it thereby becomes discriminatory.' If otherwise interested, girls are discouraged from seizing an opportunity open to them, they have been denied the benefits of a program that is not discriminatory on its face. Similarly, a sex-segregated course structure might taint an ostensibly nondiscriminatory program by failing to prepare an interested girl for the activity, so that in effect she is excluded from participation in the program."

Oddly, no one making the argument that athletics should not be covered by Title IX does so on the premise that there is no discrimination. No one denies that there is something fundamentally wrong with a college or university that relegates its female athletics to second-rate facilities or second-rate equipment or second-rate schedules solely because they are female.

There is nothing under the proposed regulations which requires equal aggregate expenditures on the part of colleges and universities for their male athletic programs and for the women. What is required is equality of opportunity. I believe this is guaranteed not only under Title IX, but under the 14th Amendment to the Constitution as well.

A recent Court decision illustrates this guarantee. In *Brenden* v. *Independent School District 742* (342 F. Supp. 1224, 1972) the Court held that a school district could not foreclose a female's right to participate on an athletic team solely on the basis of sex and sex alone. Even though not basing the case under Title IX, the Court of Appeals cited the statute on an illustration of the congressional policy against "discrimination based on 'stereotyped characterizations of the sexes'." The Court noted Congress's recognition of the importance of all aspects of education for women, it equated discrimination in high school athletics with discrimination in education, and referred in the decision directly to the intent of Title IX. I can substantiate that it was the intent of Congress.

The Title IX regulations are indeed not perfect, but they are far-reaching in many respects, covering admissions policies, course offerings, scholarship aid, counseling services, and athletic opportunity. As in all other forms of statutory regulation, their true impact will be dependent upon their vigorous enforcement.

While the impact of the Title IX regulations may be far-reaching if properly enforced, they are not a panacea. They are a first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the school of their choice, to develop the skills they want, and to apply those skills with knowledge they will have a fair chance to secure jobs of their choice with equal pay for equal work.

Senator BAYH. Mr. Chairman, as the Senate sponsor of title IX, I want to take this opportunity to thank you and Congressman O'Hara and others for allowing me to testify before your committee on title IX, which just coincidentally is the third anniversary of the enactment of this landmark legislation.

While it is indeed unfortunate, Mr. Chairman, that it has taken 3 long years for the Department of Health, Education, and Welfare to promulgate regulations to enforce title IX, it is my sincere hope that the Congress not add further to this delay by disapproving the regulations and returning them to the Department of HEW as is our statutory option during this 45-day period.

When I first offered title IX on the floor of the U.S. Senate, discrimination against women in all levels of education—elementary through graduate—was rampant. This pernicious discrimination took many forms—quota levels in admissions, inequitable scholarship aid, discriminatory course offerings, and biased counseling to name but a few. In order to rectify these clearly discriminatory conditions, the Congress wisely passed title IX of the education amendments on June 23, 1972.

And I might say that as one of Indiana's two Senators I am extremely proud of the role that our Third District Congressman played in that bill.

Unfortunately, in the 3 years since the Congress enacted title IX, the situation for women in education has improved only minimally. Current statistics on admissions to professional schools show that in 1972 only 12 percent of all students admitted to law school and only 16.8 percent admitted to medical school were women.

I might add, Mr. Chairman, for those who would point out that fewer women than men applied to law and medical schools, that it is a persistent pattern of discrimination from the time a youngster enters nursery school that results in men realizing a higher level of education, on the average, than women.

Schools, Mr. Chairman, continue to be the primary vehicles in our society for socialization and career motivation. I don't need to tell you or the other members of the committee of the importance of our educational institutions. To the extent that the school system treats women as second-class citizens, inferior to their male classmates, and less worthy of expenditures of educational resources, women will continue to occupy the lower economic strata of the society.

While homemaking may still be the main occupation of American women, it is no longer the only occupation or source of identity for most of them. A majority of young women today will work—and will work in economically disadvantaged jobs.

It has been estimated that over half of today's high school girls will work full time for up to 30 years, and 90 percent of those high school girls will be employed for other significant periods of time. Many of these young women will be the primary breadwinners for their families.

Statistics released by the Department of Labor indicate that 40 percent of the 1.8 million families with incomes below the poverty level were headed by women. In the job market these women will be facing an earnings gap between similarly employed men of more than 43 percent. Unless major changes are made in the educational options and opportunities for women, a vast majority of these women will find themselves doomed to limited, low-paying, and marginal employment.

Mr. Chairman, I might just indicate as an aside for those of us who are concerned about the children of this country, we ought to look long and hard at that 40-percent figure of the 1.8 million families with incomes below the poverty level headed by women. This means that when women can't get decent salaries it is not just they as adults who happen to be women that are suffering, it is also the children for whom they have the sole responsibility who suffer.

The title IX regulations released by the Department of Health, Education, and Welfare will not provide a change in the dismal picture of educational opportunities for women overnight but they will mark an important first step.

As the Senate sponsor of title IX, I had hoped the regulations might be more demanding of our educational institutions in order that we achieve the quality in education mandated by the Congress. Portions of the regulations that were particularly disappointing to me included the Department's modification of the contact sports requirement which shifts the burden of proof for "substantial interest" onto the shoulders of those young women who would like the opportunity to play basketball, hockey, or any other contact sport.

While the regulations are disappointing in some respects, on balance the regulations do make significant strides in mandating equality for women. The heart of these guidelines is the prohibition against the thwarting of equal opportunities for female students and teachers at any educational level.

The title IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, and in the case of teachers and other educational personnel, employment, pay, and promotions. We have waited 3 full years already for implementing regulations. Therefore, I am urging the Congress to adopt the regulations without any further delay.

Negative reactions to the title IX regulations—including those who would urge a congressional resolution of disapproval—appear to me to be based on a set of assumptions and myths about the regulations which have no basis in reality.

Mr. Chairman, I don't impugn the motives of those involved in these efforts to thwart the thrust of title IX, but I must say they read different Congressional Records and a different congressional mandate than the Senator from Indiana.

Let us look at the points which I think are most significant.

First, the definition of program.

One objection to the title IX regulations questions the scope of the statutory intent of the Congress in passing title IX. This objection centers on the interpretation of the enforcement of title IX with regard to the termination of funds to "an education program or activity." Those who voice this objection feel the current regulations go far beyond the congressional intent by attempting to regulate or enforce title IX with respect to an entire educational program or activity of an institution as distinct from the more narrow, and according to these critics, proper definition of program as a particular Federal grant program found to be in specific noncompliance with title IX.

In maintaining that the proper congressional intent was the narrow definition of program, the critics are making the assumption that the scope of title IX and its enforcement requirements are distinct from those of title VI of the Civil Rights Act of 1964, which, as you know, prohibits discrimination on the basis of race, color, religion, or national origin in all federally assisted programs.

This assumption, Mr. Chairman, in my judgment, is totally inaccurate, and I would point to my statement on the floor of the Senate on August 9, 1971, and again on February 28, 1972, and I hesitate to use my own words as a basis for support, but we all are familiar with how legislative intent is formulated and certainly how the judiciary looks at it. So I think it is fair to say my words in support of this matter during the debate on the floor of the Senate are pertinent to consideration here. I would just quote briefly from one of those statements on the 28th of February.

> Central to my amendment are sections 1001 to 1005, which would prohibit discrimination on the basis of sex in federally funded education programs. Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

In addition, the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of title IX was to provide the same coverage as has been provided under title VI.

Since the Congress intended the same statutory scope for title IX as for title VI, we can understand this concept of program and activity by looking to the Court's interpretation of the term "program" under various decisions relating to the proper scope of HEW authority under title VI.

Now, Mr. Chairman, I have gone in some length here to point out three cases, the *Bossier Parish and Lau* v. *Nichols and Taylor County*, which I recommended for your consideration. I will not go into all of them. Perhaps instead of repeating all of my testimony on these cases I could ask that it be put in the record and then take a small excerpt from the *Taylor County* case to show what the thrust of title IX is in relations to title VI.

Specifically the court held:

> To say that a program in a school is free from discrimination because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, the administrative agency seeking to cut off Federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory * * *.

Now, Mr. Chairman, I think it is easy to see how that would also be applied in the field of discrimination on the basis of sex, and certainly the Court in those other cases reinforced the Taylor holding.

Title IX, as in the case of title VI, clearly gives the Department of Health, Education, and Welfare the responsibility to enforce its regulations with regard to prohibiting discrimination based on sex in all aspects of the school program and to cut off funds when a program is being administered in a discriminatory manner or where it is so affected by discrimination elsewhere in the school program that it becomes discriminatory.

I think the record is clear not only from congressional intent but from the way the court has interpreted past similar efforts to ferret out discrimination.

Now, the second point I would like to bring to the committee's attention is the one which I suppose is causing the greatest furor and the greatest concern in the hearts and minds of a lot of people; namely, the coverage of athletics under title IX. This is certainly one which we have read about on our sports pages and front pages and have received a lot of correspondence from very concerned athletic directors and coaches who, I believe, have tended to overreact a little bit.

Those maintaining this position argue that (1) the scope of title IX is narrow and defined only to include those education programs that received direct Federal financial assistance, and (2) since athletics is not an educational program in direct receipt of Federal aid, title IX cannot and should not apply.

This objection to the coverage of programs which receive indirect benefits from Federal support—such as athletics—is directly at odds with the congressional intent to provide coverage for exactly such types of clear discrimination. For example, although Federal money does not go directly to the football program, Federal aid to any of the school system's programs frees other money for use in athletics.

Without Federal aid a school would have to reduce program offerings or use its resources more efficiently. Title IX refers to Federal financial assistance. If Federal aid benefits a discriminatory program by freeing funds for that program, the aid assists it, and I think that is rather clear.

The court in *Finch* equated program with grant statute, but it did not foreclose including within a program all the activities "benefited by the grant statute through the freeing of funds." That last sentence is a direct quote from the *Finch* case and certainly substantiates my feeling.

In the December 1974 issue of the Texas Law Review where Mr. James Todd wrote, and I will just read one sentence to show the thrust of the argument in the law review.

> In *Green* v. *Kennedy* the court noted that a tax exemption for segregated private schools might be considered financial support to the extent that it was instrumental in releasing money for discriminatory programs.

So I think the record is rather clear.

Oddly, Mr. Chairman, let me say I have heard of no one making the argument that athletics should not be covered by title IX who does so on the premise that there is no discrimination. No one is suggesting that there is not discrimination, because, unfortunately, there is.

No one denies that there is something fundamentally wrong with a college or university that relegates its female athletics to second-rate facilities or second-rate equipment or second-rate schedules solely because they are female.

There is nothing under the proposed regulations which requires equal aggregate expenditures on the part of colleges and universities for their male athletic programs and for the women. What is required is equality of opportunity. I believe this is guaranteed not only under title IX, but under the 14th amendment to the Constitution, as well.

A recent court decision illustrates this guarantee. In *Brenden* v. *Independent School District 742* the court held that a school district could not foreclose a female's right to participate on an athletic team solely on the basis of sex and sex alone. Even though not basing the case under title IX, the court of appeals cited the statute on an illustration of the congressional policy against "discrimination based on 'stereotyped characterizations of the sexes.'" The court noted Congress recognition of the importance of all aspects of education for women, it equated discrimination in high school athletics with discrimination in education, and referred in the decision directly to the intent of title IX.

Mr. Chairman, let me say I can substantiate that, in my judgment, it was the intent of Congress.

The title IX regulations are indeed not perfect, but they are far-reaching in many respects, covering admission policies, course offerings, scholarship aid, counseling services, and athletic opportunity. As in all other forms of statutory regulation, their true impact will be dependent upon their vigorous enforcement.

While the impact of the title IX regulations may be far-reaching if properly enforced, they are not a panacea but I think they are a first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with knowledge they will have a fair chance to secure jobs of their choice with equal pay for equal work.

Mr. BRADEMAS. Thank you very much, Senator Bayh, for obviously a very carefully thought out statement on this important issue.

I might make a comment with respect to one of the points in your statement which begins, I think, on page 4, in which you speak of the view of some critics to the effect that the scope of title IX and its enforcement provisions are somehow intended to be distinct from the 1964 Civil Rights Act, and I would only say in support of the observation you make that that assumption on the part of the critics is inaccurate.

I would only cite the minutes from the meeting of the Committee on Education and Labor of the House of Representatives of September 30, 1971, minutes which cover the proposal by Mrs. Green of Oregon of the title here under consideration.

And if one looks at the pages of those minutes, one will see that several paragraphs have been taken in toto from the Civil Rights Act, from title VI of the Civil Rights Act, and in Xerox form included in Mrs. Green's proposed amendment, thereby confirming that indeed it was the intent of the sponsors of this statute, that is to say, the intent of the sponsors of title IX, to provide, and to quote you, Senator, from your statement on page 5, "The same coverage as had been provided for title VI."

And I make that observation in that I felt it useful to point out how the House position on this matter was on all fours with the Senate position as articulated by you in the other body.

Senator BAYH. Mr. Chairman, I think that is correct to point out that inclusion in the minutes, and I am sure you are also very much aware that when the Deputy Assistant Secretary for Higher Education testified over here back in 1970 he put HEW squarely on record that this would be the interpretation then.

Mr. BRADEMAS. If I could turn to just one other area and then yield to other members of the subcommittee, and that is the area which you quite appropriately observed has aroused more controversy than some other provisions, and that has to do with the provisions regarding athletic programs.

It is my understanding, Senator, that draft regulations do not require equal expenditures on men's and women's sports programs, as indeed you on page 10 of your statement say, where you declare, "There is nothing under the proposed regulations which requires equal aggregate expenditures on the part of the colleges and universities for their male athletic programs and for the women. What is required, I want to say, is the equality of opportunity."

I understand that the regulations do not require mixed teams in contact sports or in sports where selection is based on competitive skill, nor do they require sponsorship for women's teams in every sport for which there is a men's team.

The regulations do, however, lean very heavily on adjudication on a case-by-case basis. And the regulations say that while the kinds of requirements that I am just indicating are not included, such factors as comparative expenditures may be taken into account in reaching an overall judgment on whether an institution is in compliance.

That at least is my understanding of the meaning of these regulations, and I would be grateful, Senator, if you or counsel wish to comment on that observation.

Senator BAYH. Yes; Mr. Chairman, I think you stated it very well. And even the comparative expenditures, I would like to point out, need not meet the test of a 50–50 portion of the expenditure, but that the comparative expenditure would be related to the amount of interest shown among female and male athletes.

I think, Mr. Chairman, this isn't the panacea guideline to effect what distinguished Congresswoman Chisholm and the rest of us have been fighting for, for a long time, equal rights for women. When the ERA passes it, it isn't going to be a panacea for everybody, but I think we are making steps. The full opportunity for women to participate as athletes or in athletics is going to come a number of years from now when a sufficient time has passed for women at an early age, in grade schools and in high schools, to be given the opportunity to test their skills, and thus to develop them and not to be stereotyped as unable to compete.

I must say, my father, as you know, was in physical education for most of his 53 years in the school system. He is no longer with us, so I haven't had a chance to try this title IX on him for size. I don't know honestly how he would look at it, but I do remember when I was very young that he thought that physical education was indispensable in training a sound body to carry around the mind. He emphasized the need to make this physical education experience available for girl and women students.

I think that is what we are looking at, how they can have an opportunity to participate. I don't see all of these big concerns which I understand are very legitimate concerns expressed, well-intentioned, but I think they are based on a misconception. I don't see this wrecking of the major universities' football program at all. I love sports and athletics myself. I would not want to see that happen.

But I don't think it is necessary for us to presume that in order to give the women students in an institution adequate participation in physical education this is going to per se destroy the men's program. Why can't we have good programs in both?

Mr. BRADEMAS. So just to walk you through this one more time, Senator, and this will be my last question, you agree then, I take it, that it is well-settled that statutes such as the one under consideration require a clean bill of health for the entire educational institution, not just the part of the institution that is directly receiving assistance?

Senator BAYH. Yes, sir.

Mr. BRADEMAS. And you would agree then that athletics would be included, would be covered by the regulations under consideration?

Senator BAYH. Yes, sir.

Mr. BRADEMAS. Would you then, in light of what you just said, agree with the proposition that were these regulations to be implemented, athletics as an organized activity in America's institutions of education would not be destroyed by these regulations?

Senator BAYH. I certainly think not. I think it would lend diversity, broader opportunities to more students. Isn't that what the educational experience is all about?

Certainly the women students of America have been denied the opportunity at a very amateur, inefficient level to enjoy the sports activities in the school. I know very well that the girl students and women students who were going right through the same educational process with me were denied what I thought was a significant part of my educational experience.

Mr. BRADEMAS. Well, thank you very much, Senator, your views have been most helpful to me.

I recognize the gentleman from Minnesota.

Mr. QUIE. Senator, thank you for your testimony. In your testimony you compare discrimination based on sex with discrimination based on race. As I read it through, you believe that we should have the same interpretation of title IX as we do of title VI, meaning that there should be no discrimination at all on the basis of sex, just as there can be no discrimination on the basis of race; is that right?

Senator BAYH. In general, yes.

Mr. QUIE. Then, looking at the regulations, does that not imply that there is a difference in sex and that you can't discriminate? On the other hand, it seems that the regulations permit discrimination in contact sports, that is, a school can preclude a person of the female sex from competing for a slot on the team of a male team of contact sports.

Now, we don't have anything similar to that for providing equality of opportunity in sports for racial groups, but you do have to permit blacks to go out for the football teams.

Senator BAYH. I think that is a fair discrimination to weigh between this title and title VI. If I were writing the regulations, I would not have written them that way. In fact, I wrote a letter to the President respectfully suggesing that he take a hard look at that very feature as well as some others which he ultimately did incorporate in the final draft. The original draft of HEW a year ago I thought was a much better draft than the one which was sent to the White House but the one that is being presented now is better than the draft sent to the President.

I think in order for us to make progress we are going to have some give and take here, and I find that those regulations although they are not as far as I would like them to go in treating everybody equally, I think they make a significant improvement in our educational opportunity.

Mr. QUIE. I understand that at HEW there was a feeling that if you permitted the complete opportunity or complete competition it would end up that the women would have less chance to engage in intercollegiate or interschool sports than they presently do.

Do you agree with that?

Senator BAYH. Yes, I agree with that. Let's take basketball, which is classified as a contact sport. I see nothing wrong with letting women basketball players get out there on the floor and show their skills with the guys. I mean unless she can do that she is not going to be able to participate, just as, let's say, a small male student.

Now, inasmuch as we are trying to compensate for generations of stereotype, I think it is going to take us some time before women really are going to be able to develop full potential of their skills. And if indeed the thrust of a physical education system is more than just to have 22 young men out there knocking heads on the football field, which we all like and enjoy, but if indeed the whole thrust of physical education programs is to build a character and sound bodies and spirit of competition, then I think we must make this available for those who might not qualify on the major varsity team.

That is why I am prepared to buy the regulations, although I would have preferred that it meet the standard that Congressman Quie suggests.

Mr. QUIE. What gives the Secretary the authority to rule that women are different and therefore the schools should not be required to permit them to compete in contact sports?

Senator BAYH. Well, we gave him the authority to write the regulations. I would change some of those regulations and did suggest that some of them be changed and some of them were. And I suppose that in final analysis this body and ours does not concur with the wisdom of the Secretary of HEW. We have in the statutes 45 days for the opportunity to make those observations null and void. I think that would be a mistake, because I honestly believe some people would like nothing better—and I say that this is very pragmatic for Congress to turn down these regulations so we could go 3 more years before we get any regulations.

Mr. QUIE. Why do you say 3 more years?

Senator BAYH. Because it is 3 years since we passed this and we haven't had the regulations until now. They are not perfect; but better than no regulations. They give us the foundation upon which to let women share in the athletic experience that they haven't had a chance to share before now.

Mr. QUIE. Just because it takes 3 years to go through the thought process in order to come out with regulations anywhere near acceptable, I don't see why that means you have to go back to the drawing board again. There were certainly decisions made in that thought process leading up to the regulations as now promulgated. It seems to me you can review and modify them in much less time than 3 years. From my information, if we are specific enough in a resolution of disapproved, it would be possible for them to be implemented by the fall of this year.

Senator BAYH. Well, you could do it in a week, you are right, you could. But it took us a whole year from the time we got the first draft to where we are now. I mean there seems to be more than just an effort to study and perfect. I think that if you and your colleague from Indiana were to get at this in one afternoon maybe in just a few short minutes you could perfect those. But I must say I don't think that you are going to be given that responsibility.

Mr. QUIE. No, for good reason, too.

I notice in August 1971 you submitted an amendment which was to preclude the discrimination on the basis of sex. As you put it, "To provide that no person in the United States shall on account of sex be excluded from any program or activity," in quote, "conducted by a public institution of higher education for any school or department of graduate education, which is a recipient of Federal financial assistance."

And you explained to your colleagues, that incentive would end discrimination by denial of admission or benefits by any public institution of higher learning or any institution of graduate education which receives Federal educational assistance.

Now, in title IX we also adopted a prohibition against discrimination against the blind, which uses similar language. It says no person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of financial assistance for educational activity.

So in both amendments which you offered on August 6, 1971, and in prohibiting discrimination against the blind, the language speaks of the recipient of Federal assistance for an educational program or activity.

However, in title IX the language used, with which you are familiar, states that no person in the United States shall, on the basis of sex, be precluded from participation in, be denied benefits of or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

Don't you think that it could be that the Congress knew what it was doing when it wrote the language in section 901 differently from this language in section 904, and also differently from the way you proposed to have it in the Senate with your amendment?

Senator BAYH. Oh, I think Congress knew exactly what it was doing and it did, in my judgment, intend to do just what I said. I think Chairman Brademas pointed out that the minutes of the House procedure points this out.

My statement on the floor, both in debate and earlier, points out what we intended to do. I think we clearly intended to cover pretty well as I have discussed it. I say that without any pride in the authorship, but I think that is just what we intended.

Mr. Quie. But the difference, you see, is between your amendment as adopted and that covering discrimination against the blind. The latter refers to institutions receiving Federal financial assistance, while in actuality your amendment as adopted refers only to programs and activities that receive Federal financial assistance, and athletics don't receive Federal assistance.

You mentioned the *Taylor County* case, and it seems to me from that case that the fifth circuit decided that even under the Civil Rights Act the Secretary could not go beyond what the Congress had indicated was his jurisdiction.

And in both instances if Congress knew what it was doing, it must have written this language differently than the other language in order to specifically make it apply only to programs or activities.

Also, in talking about the leverage to be exerted on an institution you stated to Senator Dominick that this leverage would not be directed at specific assistance that was being received by individual students, but would be directed at the institution, therefore implying that the fact that students receive Federal assistance does not constitute Federal funding to an institution.

Senator Bayh. Well, that is much different, isn't it? That is much different. You don't penalize the students taking away a GI bill check because the institution to which they go doesn't let black students in the photographic lab. I mean it is much different there, may I say with all respect.

Mr. Quie. But what gives authority to regulate, if you don't at the same time have the authority to remove the funds as a sanction?

Senator Bayh. Sir, I think you do.

Mr. Quie. You stated there that they did not have that authority.

Senator Bayh. To take it away from the students.

Mr. Quie. That is right.

Senator Bayh. Well, I still believe that, because we are talking about a specific scholarship loan program, GI bill programs, and to suggest in order to rule out discrimination you have to deny scholarships to students who are going to an institution in order to find a way to police discrimination, isn't the way it has ever been done, in my knowledge.

What you do is you go to the Federal grant programs that go to the institution, and then historically in civil rights, black versus white, on the basis of color, we have not limited that ability to withhold funds to those specific programs to which the discrimination is alleged.

Mr. Quie. Are you then saying that the mere fact that an institution accepts students who receive Federal assistance does not bring them under title IX?

Senator Bayh. My distinguished colleague is usually very astute. Maybe I am having difficulty understanding just what he is directing his attention at. I don't think we have ever had an effort to cut off, say, scholarship students under the GI bill. You can take that scholarship and go anyplace you want to. That hasn't ever been used as leverage.

Mr. QUIE. I am talking about whether the Department of Health, Education, and Welfare has overstepped its bounds in claiming that an institution is conducting a program or activity financed by the Federal Government if a student is receiving Federal aid to attend that program or those programs.

Senator BAYH. You know, I just don't know. I would have to look that up if you would like; perhaps you know. That is not generally the kind of penalties that are meted out, as I am sure you realize.

Mr. QUIE. But I have heard it claimed that that is one of the reasons why they have jurisdiction.

Senator BAYH. I have not.

Mr. QUIE. You have not.

Mr. BRADEMAS. Perhaps, if the gentleman would yield, just an observation, just a rhetorical observation at this point which I don't think is quite an answer to, there might be some distinction on the one hand between GI loans administered by VA and grants on the one hand and supplemental education on the other hand administered by the institution. I raise that possibility.

Mr. SIMON. Would the gentleman yield?

It also seems to me there are substantial areas of indirect Federal assistance. For example, I am confident the University of Minnesota has an athletic association which is a nonprofit corporation where people donate money, and they are given tax deductions, so that indirectly there is a Federal subsidy to the University of Minnesota athletic program.

Mr. QUIE. That is right.

Mr. Chairman, I yield the floor.

Mr. BRADEMAS. The Chair recognizes the gentlelady from New York, and because the Chair must himself go to another meeting, I invite the lady to take the chair.

I thank the distinguished gentleman again for his fine testimony.

Mrs. CHISHOLM (presiding). Thank you very much, Senator Bayh, for making an appearance before the committee today, because I think you put several things in their proper perspective. Although the furor has been centered around intercollegiate sports activity, I think title IX embraces much more than just sports. We are talking about equality of opportunity for all persons regardless of their race and of their sex.

As you indicated title IX cannot legislate attitudes. There is no kind of legislation authorized by this Congress that can legislate people's attitudes. But we can provide the kind of atmosphere and kind of thrust that will be conducive for bringing about an equitable society and giving protection to those individuals who without title IX and who without title VI would not have any recourse in terms of protecting their basic rights.

So I think we have to recognize that title IX will go against certain basic traditions in our Nation. Many have been quite comfortable, and many do not desire to rock the proverbial boat. This does not mean that we should not be responsive to the large segment of society which is now demanding their fair share.

Would you concur that since the language of title VI and title IX are so similar and since title VI has been applied institution wide, title IX should and must be interpreted in the same manner covering all of the educational programs carried out by educational institutions receiving Federal funds?

Second, as you know many of the intercollegiate coaches appearing here in the past few days, have indicated that they are not in receipt of direct Federal funds. Wouldn't you say that educational aid to one particular kind of school activity can indirectly give financial assistance to other activities in these institutions? For example school bonds to build a stadium, or by the releasing of funds usually put into vocational education programs, because of receipt of Federal funds in that area.

In other words, what I am trying to get to you with all of this preliminary "trip" that I am taking you through is that we are involved in much more than a question of intercollegiate sports, or the question of whether or not sports are going to be able to produce revenue. This is a question of a basic right.

Senator BAYH. Well, not only do I feel that personally, but I would like to reiterate what I said earlier in my opening testimony, and whether anybody on the floor of the Senate was listening or not when this debate was going on, I can tell you what a chief sponsor of title IX did say; that the thrust of title IX was to fill a loophole in title VI. And it was pointed out that we set forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

So it was rather clear as that measure was moving through the Senate that we were trying to base title IX on the same general authority as title VI.

Now, in answer to your second reference, I would hope that a nation that is as powerful and ingenious as ours, which has been able to perform miracles in technology and science, ought to be able to let little girls and little boys have equal opportunity to develop their athletic and physical talents without destroying the major athletic events that we all enjoy.

I think we are selling ourselves short. I suppose it is the responsibility of a coach or athletic director who is really concerned about this and we share that concern. But some of us have seen the capacity of this Nation to do some rather miraculous things, I do not see allowing women equal opportunity in athletics as an obstacle that is too large for us to overcome.

Mrs. CHISHOLM. Just one other observation. The labor force in this country is becoming more and more heavily populated by women.

Would you also agree that title IX is essential in helping the women in this society, especially those who are the sole wage earners, to be able to make a contribution on the basis of their talents and abilities. Don't you think title IX is essential to these women?

Senator BAYH. Well, I think that is one of the major benefits that will be derived from title IX. We all know there is a direct relationship between educational opportunity and talent and skills that are marketable. And it doesn't do you any good to pass a Federal statute saying equal pay for equal work if earlier in the life cycle that woman doesn't have an equal chance to get skills that are marketable on the open market.

I think if I had to pick one thing that I think title IX will accomplish more than any other, I would have to put that right at the top of the list.

Mrs. CHISHOLM. Thank you very much, Senator.

Mr. Simon?

Mr. SIMON. Just a few observations.

First of all, I agree with your conclusion that HEW acted properly; this is within its scope. But you obviously feel that these regulations can be adopted without impairing the football team at the University of Indiana or Purdue University—more importantly than that, Southern Illinois University—I gather that is your conclusion, Senator?

Senator BAYH. I think this would not be an appropriate place for us to compare football teams, but yes, that is a fair statement.

Mr. SIMON. Then, just one final observation, and that is your written testimony and your subsequent testimony is based on the conclusion that whoever administers the act is going to use some common sense, and it seems to me that many of those who oppose these regulations in fact are assuming the most extreme kinds of possibilities.

I appreciate your testimony.

Senator BAYH. Thank you, Congressman Simon. I appreciate your observation. I think we usually opt to common sense when given our opportunity.

Mr. SIMON. Thank you, Mr. Chairman.

Mr. BLOUIN [presiding]. Thank you.

Mr. Buchanan?

Mr. BUCHANAN. Thank you, Mr. Chairman.

Senator, I think your testimony is quite important to us here because, as you are all aware—I won't go over the same ground the third and fourth time—but there have been those who felt title IX simply did not reach beyond the programs directly funded with Federal assistance, and your testimony as chief Senate sponsor that it wasn't clear intent supported by statements before the time passes that title IX should reach out against sex discrimination throughout institutions which receive Federal funding, and that is your testimony, as I understand it.

Senator BAYH. Yes, sir.

Mr. BUCHANAN. It is quite important.

The gentleman from Indiana, Mr. Brademas, put into the record some of the testimony from our former colleague Ms. Green on the House side. There are those who would raise the issue that neither title VI nor title IX in fact reach programs not receiving Federal assistance, but that in the case of title VI the 14th amendment would cover any ground not specifically covered in the legislation, and therefore the courts have permitted regulations to reach into those areas not directly touched by Federal funding, whereas this would not be attributable to title IX because we are waiting for equal rights amendment passage.

I gather you do not subscribe to that viewpoint.

Senator BAYH. No, sir, I do not.

Mr. BUCHANAN. Now, the third question is a little more pragmatic. I have been rather impressed by the weight of some of the people on the other side; I mean, of the political clout, potential clout of some of the witnesses on the other side, NCAA, the coaches, et cetera.

Senator BAYH. The Senator from Indiana is not oblivious to that.

Mr. BUCHANAN. Senator, do you think you have the votes?

Senator BAYH. Sir?

Mr. **Buchanan.** Do you think you have the votes to support the position?

Senator **Bayh.** Well, I think so. I hope so. I must say, one thing I didn't do is to count noses on our side before I came over here to tell you what I thought was right.

Mr. **Buchanan.** I am sure you didn't.

Senator **Bayh.** I know none of us operate that way, but we can't be oblivious of the prestige and the political muscle that the gentlemen who have testified have in our communities. I just don't think that it is going to have that kind of a negative impact.

I think they are concerned about something that just isn't going to come to pass. I noticed in looking at a study the other day where it talks about some of these segregated athletic facilities or activities being indispensible to fund the entire athletic program. I noticed that the NCAA statistics show an annual member deficit of $50 million now.

And that further I saw a report that estimated that 95 percent of intercollegiate athletics are in the red. I think what one has to find when you look at the way fees are paid is that everybody's fees are used to fund an institution's athletic system, women students and men students.

I have no bone to pick with subsidizing athletic systems' programs. I think that makes a contribution. But, if we are going to do that, to say that only part of the students participate in it, that is discriminatory. I don't think anybody envisions women at the Rose Bowl, but at least women students ought to have opportunities to participate commensurate with the interest they show, and that is clearly what it says in the regulations and I am just not concerned about that.

I am, I guess, being a little human, wondering what the impact back home is going to be. Basically when we take the time to study something to find out what is right, usually the time is right to convince our constituents that it is right.

Mr. **Buchanan.** Thank you, Senator.

Mr. **Blouin.** Senator, some of the testimony we heard last week came, obviously, from coaches, and NCAA made some comments which had trouble setting with me, and most of the comments were on the premise that the regulations were obviously outside of the boundaries of the intent, and I am very pleased that you have taken some time today to at least let us know the intent of the authorization—you obviously had a lot to do with stirring this thing through the Senate, and I am hopeful that we can find that same kind of support from the House when the bill is pursued.

I am convinced, or at least more convinced than I was last week, that the intent of Congress was very clearly within these regulations and that they are not violating anything that the Congress has done.

I am not as concerned, frankly, about the effect it has on collegiate football or basketball. So what if it does hurt. That in itself is an indication there has been discrimination for years, and that it is time we balance things off.

One point that the intercollegiate athletic groups consistently turned to dealt with what they thought would be a suffering in quality of the athletic endeavors simply because there would obviously be a decrease in revenues, and there was a correlation between that.

You have obviously worked with this for some time. Do you see a correlation between the quality of the educational experience of athletics and whether or not it can produce revenue as an intercampus activity?

Senator BAYH. I have been nursed in a family where the bread was put on the table by physical education. I have been in that environment plus, I think, the general environment of young men, when I used to be young and enjoy this participation.

I am not sure that the purpose of a university or a college or an elementary school or a high school is to raise "Big 10" champs. The whole purpose is to give young men and women the skills they need to provide for themselves and live full and complete lives.

As I said earlier, I don't see that this is going to destroy our major athletic programs. But if it perhaps has a 5 percent or a 10 percent less grade on the expertise scale and you get 10 or 20 percent more students participating and enjoying physical education, I think the final mission of that institution is going to be a more salutory one.

I get out there and cheer and jump up and down with everybody else. I had a great opportunity to attend several of our Indiana University basketball games with my son who was a freshman. But I must say in the final analysis I think there was an equal contribution being made to the young men of our institution who were participating in intramural athletics, who had a chance really to participate to the limit of their skill, which wasn't going to get them out there in the NCAA playoffs. Interestingly enough, there weren't many women students having even that opportunity. So I think we had better keep our perspective straightened out here.

Mr. BLOUIN. I am very glad you answered the question that way, Senator. I think the record needs to show that there are two very valid sides to that question, that at least from the Senate-sponsored side that that legislation's intent is clear, to balance off the institutional educaional opportunity of athletics.

I was probably a little harsh with Mr. Fozik Friday. But I firmly believe that unless we do something to equalize the availability of athletic opportunities, primarily in the major sports, we are going to continue to develop an image of nothing more than a minor league for professional football and basketball. If that is in fact what we want, maybe it ought not to be on the campus. Maybe it ought to be in a semiprofessional or a professional arena away from the campus.

Senator BAYH. I wonder if it would be any less of a thrill to be on a "Big 10" championship team that had three fewer scholarships than the one had last year. Would that be any lesser goal when the banner is hung up over the Coliseum? I don't think so. I think it is all a relative kind of thing.

Mr. BLOUIN. I doubt very much if the participants or the spectators would care very much either way. Achieving the goal is more important than the fringe of it.

That is all, Madam Chairwoman.

Mrs. CHISHOLM. Thank you, Senator. I want to thank you again for your appearance before this committee. You have been a profile in courage with respect to so many issues that concern this segment of society. Thank you again for your appearance.

Senator **Bayh**. Thank you very much, Madam Chairwoman. I appreciate the work the committee is doing and the courtesy you have given me.

[Supplementary material supplied by Senator Bayh follows:]

Washington, D.C., *December 20, 1974.*

To: Honorable Birch Bayh.
Attention: Barbara Dixon.
From: American Law Division.
Subject: Proposed Regulations of the Department of Health, Education, and Welfare to Enforce the Sex Discrimination Provisions of the Education Amendments of 1972 (Sections 901 *et seq.*, P.L. 92–318).

Reference is made to your inquiry of November 25, 1974, relative to the above. Specifically, you ask whether the proposed H.E.W. regulations under Title IX of the 1972 Amendments—barring sex discrimination by recipients of federal educational assistance—might be read as applying across the board to educational institutions covered by the Amendment thereby authorizing the agency to terminate all assistance to such institutions where discrimination is found to exist. See, 39 F.R. 22228–22240 (June 20, 1974). Additionally, you ask our views concerning the legal validity of such an interpretation in light of programmatic limitation found in sections 901 and 902 of the Amendments.

Section 901 of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." That section then goes on to carve out specific exceptions from the general prohibition with respect to "admissions to educational institutions." Basically, admissions policies to all institutions are exempted except "institutions" of vocational education, professional education and graduate higher education, and "public institutions" of undergraduate higher education.

Section 902 contains two basic limitations on agency authority to terminate assistance for violation of the Act. The first of these is essentially geographical in nature, limiting the effect of any cut-off to "the particular political entity, or part thereof" where discrimination occurs. The section further provides, however, that any termination is to be restricted to "the particular program, or part thereof, in which . . . noncompliance . . . has been so found."

As suggested by the foregoing, the statute appears to adopt, for the most part, a program oriented approach to sex discrimination essentially the same as that embodied in the parallel provisions of Title VI of the 1964 Civil Rights Act (42 U.S.C. 2000d *ed seq.*). That is, the basic prohibition of section 901 speaks in terms of discrimination under a "program or activity" receiving federal financial assistance. Similarly, the termination sanction prescribed by section 902 is limited in its effect to the "particular program, or part thereof" where discrimination is found to exist. Read together, these restrictions seem clearly to indicate that Congress intended that administrative authority to discontinue assistance be circumscribed within some limits, but the precise scope of this limitation is undefined on the face of the statute and thus remains somewhat uncertain. This basic ambiguity is further compounded in the case of institutional recipients by the express prohibition in section 901 of discrimination in admissions to certain institutions of higher education.

The proposed H.E.W. regulations until Title IX seems to employ a corollary distinction between discrimination in admissions to covered institutions and other less pervasive forms of discrimination limited in their effect to specific programs and activities conducted by a recipient. Subpart C of the regulations bars discrimination "by any recipient" in admissions and recruitment generally and section 86.34(b), which applies to local educational agencies, likewise prohibits discriminatory admissions policies with respect to "any institution of vocational education" or "any other school or educational unit" operated by such agency. This institutional approach where admissions policies are involved is subject to the single express exception contained in section 86.2(o). That section, which tracks a similar provision in section 901(c) of the Act, provides in effect that where an education institution is composed of more than one school, department or college, admission to which is independent of admission to any other component, each such school, department or college, is considered as a separate unit for the purpose of determining whether its admissions are covered by the regulation. Thus, according to the explanatory matter accompanying the proposed regulations "if a private institution is composed of an undergraduate and graduate college, admissions to the graduate college are exempt . . . but admissions to the graduate school are not." See, 29 F.R. 22228.

Subpart D, on the other hand, is apparently concerned primarily with discrimination in particular programs and activities operated by a recipient—whether a public or private agency, institution, or otherwise—other than overall admissions policies. Thus, section 86.31 *et seq.* would reach discrimination under "any academic, extracurricular, research, occupational training, or other program or activity . . . which receives or benefits from federal financial assistance." In short, the proposed regulations arguably reflect a position on the part of the agency that, for purposes of determining compliance, the educational activities of institutional recipients may, where general admissions policies are concerned, be viewed as a individual entity. Where less pervasive forms of discrimination are involved, however, the regulations seem to contemplate a program by program approach to coverage.

The basic provisions relating to procedures for effecting compliance with the Act are set forth in Subpart F of the regulations. Section 86.48(c), which deals with the termination of funding, expressly incorporates the "pinpoint" provisions of section 902 of the Act and provides that "[a]ny action to suspend or terminate . . . Federal financial assistance shall be limited . . . to the particular . . . recipient . . . and shall be limited in its effect to the particular education program or activity or part thereof in which such noncompliance has been so found." Additional evidence of the agency's view with respect to its authority to terminate assistance might be inferred, however, from its position that "an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or *benefits* from such assistance." (emphasis added) 29 F.R. 22228. In support of this interpretation, H.E.W. asserts reliance on the Appeals Court ruling in *Board of Public Instruction* v. *Finch*, 414 F. 2d 1068 (C.A.5 1969) where it was held that, under the parallel provisions of Title VI of the 1964 Civil Rights Act, federal funds may be terminated on the basis that they "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment."

The *Finch* case involved a determination by H.E.W. that a county school board was out of compliance with applicable school desegregation guidelines under Title VI of the 1964 Act. Specifically, the hearing examiner found that the school district's "progress toward student desegregation was inadequate," that it "had not made adequate progress toward teacher desegregation" and that the district was "seeking to perpetuate the dual school system through its construction program." Based on these findings, an order was entered terminating "any classes of Federal financial assistance" to the district "arising under any act of Congress" administered by H.E.W., the National Science Foundation, and the Department of Interior until compliance was achieved.

On appeal, the school board argued that H.E.W.'s order terminating Taylor County's aid to education violated section 602 of the 1964 Act which, like section 902, provides that the termination sanction "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found . . ." The Board contended that section 602, in effect, requires the federal government to make a finding of discrimination in the operation of each program funded by a particular grant statute. In other words, it was urged that if H.E.W. desired to terminate all assistance to the district, it must demonstrate not simply the basic dual nature of the school system, but that a particular program was being operated in a discriminatory fashion. H.E.W. argued, on the other hand, that the Board's interpretation of Section 602 was incorrect and that a general finding of discrimination in the operation of the school system justified termination of all federal aid in the absence of a showing by the recipient that a particular program was free of discrimination.

The Fifth Circuit rejected H.E.W.'s position and adopted the Board's interpretation of section 602. Reading the term "program" as used in that section to mean "particular grant statute," the court held that a general departmental finding of discrimination in the operation of an elementary and secondary school system is insufficient for termination of all federal education aid to that system. In concluding that section 602 requires program oriented findings of fact, however, the court specifically stated that such a requirement does not mean that each program must be considered in isolation.

"To say that a program in a school is free from discrimination because everyone in the school is at liberty to partake of its benefits may or may not be a tenable position. Clearly the racial composition of a school's student body, or the racial composition of its faculty may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, the administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory." 414 F.2d 1077–78.

The court did not, however, provide any guidance concerning the kind of fact-finding necessary to satisfy its interpretation of section 602. H.E.W. was provided with no express standards for determining what constitutes a sufficient showing of discrimination in the expenditure of federal funds under a particular grant statute or for deciding when one program is "so affected by discriminatory practices elsewhere in the school system" as to justify termination of funds.

The proposed Title IX regulations do not on their face appear inconsistent with the standards set out in *Finch* under Title VI. For while that decision requires the agency to make program by program findings to support a wholesale termination of assistance, the principle announced by that ruling is more in the nature of an evidentiary standard that a substantive limitation and, as such, would not preclude termination of all assistance to a covered institution provided that the agency specifically finds that each funded program or activity is "so affected by discrimination elsewhere . . . that it thereby becomes discriminatory." As noted, the proposed regulations adopt the programmatic limitation of section 902 and do not purport to dispense with the fact finding burden imposed by the *Finch* ruling under the analogous provisions of Title VI. Indeed the agency's express reliance on that decision might be read as indicating its intent to adhere to the principle established therein. Thus, while H.E.W. might arguably be authorized under its Title IX regulations to terminate assistance across the board to institutions which discriminate against women in admissions—at least where the policy is not limited to an "administratively separate unit"—or in other appropriate circumstances, this result would seem sustainable under the *Finch* doctrine so long as it is supported by the required administrative findings, i.e. that the offending practice is of a sufficiently pervasive nature as to create a "discriminatory environment" which "infects" each assisted program or activity conducted by the recipient.

Although the Congressional debates surrounding Title IX are somewhat sparse and inconclusive on the issue, certain portions of the legislative history lend arguable support to H.E.W.'s interpretation of its authority to terminate assistance under Title IX. In the Senate, a somewhat different version of the sex discrimination provisions were originally proposed as an amendment to S. 659 by Senator Bayh of August 6, 1971. 117 Cong. Rec. 30399. The debate at that time centered primarily on the [illegible] of educational institutions proposed to be covered and certain other unrelated matters, but some discussion was directed to the effect of the fund termination sanction. During the course of that debate, Senator Bayh made the following observations in response to questions from Senator Dominick.

"Mr. DOMINICK. What type of aid the recipient might be getting would be cut off? Let us suppose, for example, that they have guaranteed loans for construction. Let us suppose that they have research grants under the NIH. Let us suppose that they are doing graduate work in some programs authorized by the Defense Department. Just what type of aid are we cutting off here?

"Mr. BAYH. We are cutting off all aid that comes through the Department of Health, Education, and Welfare, and as to the specific ones, the Senator has mentioned, I think they would all be included with the exception of research grants made through other departments such as the Department of Defense.

"Mr. DOMINICK. The Senator is talking about every program under HEW?

"Mr. BAYH. Let me suggest that I would imagine that any person who was sitting at the head of the Department of Health, Education, and Welfare, administering this program, would be reasonable and would use only such leverage as was necessary against the institution.

"It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution, and the Secretary would be expected to use good judgment as to how much leverage to apply, and where it could best be applied.

"The civil rights experience, as the Senator from Colorado knows, indicates that the very possibility of such a sanction has worked wonders. (117 Cong. Rec. 30408 (Aug. 6, 1971))."

As amended and passed by the House, S. 659—for which the House had substituted the modified language of H. 7248—prohibited discrimination on the basis of sex in any educational program receiving education financial assistance. During floor debate on the measure, Mr. Steiger engaged Mrs. Green, floor manager of the bill, in colloquy relating to agency authority to terminate assistance.

"Mr. STEIGER of Wisconsin. Mr. Chairman, I move to strike the requisite number of words, and I rise in support of the amendment.

"Mr. Chairman, let me proceed along the line of the gentleman from Louisiana, and let me ask the gentlewoman from Oregon (Mrs. GREEN) for clarification on what I thought I heard.

"In title X the gentleman from Louisiana asked relating to a program on activities receiving Federal financial assistance, and under the 'program on activity' one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, title X, to only programs that are federally financed? For example, are we saying that if in the English department they receive no funds from the Federal Government that therefore that program is exempt?

"Mrs. GREEN of Oregon. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity. Discrimination would cut off all program funds within an institution.

"Mr. STEIGER of Wisconsin. So that the effect of title X is to, in effect, go across the board in terms of the cutting off of funds to an institution that would discriminate, is that correct?

"Mrs. GREEN of Oregon. The purpose of title X is to end discrimination in all institutions of higher education, yes, across the board, but we do have the three exemptions to which I referred.

"Mr. STEIGER of Wisconsin. Mr. Chairman, I must admit that I cannot have anything but mixed feelings about a debate on discrimination. The hearings before the committee are full of testimony clearly indicating discrimination by institutions of higher education in graduate enrollment, living practices and promotions.

"I have three comments on the whole question of the amendment now before us. One is that I find myself somewhat surprised that there is so much power granted to HEW under title X when in fact the gentlewoman from Oregon has been a most strong opponent of granting additional powers to HEW. Perhaps in this field she feels that there is some greater justification for granting this much power.

"Secondly, under the bill, under the titles which we have gone over before, we have in effect allowed the local financial assistance officers to have a rather broad sweep of powers in their right to pick and choose those who should receive aid which could work against low-income students, but in this one we now are going to say that it is the Federal policy that you cannot discriminate because of sex. This dichotomy confuses me on one hand we grant latitude and autonomy while on the other limiting autonomy.

"And thirdly, Mr. Chairman, may I say in all honesty that I fail to be moved by the argument that because it is public policy under the Constitution that you may not discriminate because of race, creed or national origin that now suddenly we find ourselves saying we will make this public policy that you may receive no Federal funds if you do not follow the open admissions policy advocated here by some, not as a right but under the law. (117 Cong. Rec. 39256–7 (Nov. 4, 1974).)"

In evaluating the validity of the proposed regulations, a final consideration should be kept in mind. It is a well established principle of administrative law that in construing the application of a statute the courts will give deference to official interpretations of the agency charged with its enforcement. See, e.g. *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294 (1933); *Skidmore v. Swift and Co.*, 323 U.S. 134 (1944); *KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vending Corp.*, 264 F. Supp. 35 (C.D. Cal. 1967). As stated by one court, "We are without authority to overturn an administrative interpretation of an act or regulation unless it can be said that the construction is 'plainly erroneous or inconsistent with the regulation.' (Citations omitted). Even though our views with regard to the interpretation differ from those of the administrative agency we would not be authorized to substitute our views if it can be said that the administrative interpretation was a reasonable one." *McCall Coal Co.*

v. *United States*, 374 F. 2d 689, 691 (1967). While this principle of judicial deference may apply with different force according to whether findings of fact or questions of law are involved, it seems clear that the courts will customarily accord some weight to the contemporaneous construction by the appropriate federal agency where not in conflict with the legislative history or the clear meaning of the statute.

In sum, therefore, the proposed Title IX regulations seem to authorize the termination of all assistance administered by H.E.W. to a covered educational institution in certain circumstances. Wholesale fund cutoffs of this nature are apparently limited by the regulations, however, to cases involving admissions policies or other pervasive practices affecting all assisted programs or activities conducted by the institution. This approach seems to accord with the result reach in *Finch*, provided that it is supported by the required evidentiary findings. Moreover, since the meaning of the term "program," as used in section 902 is not altogether ascertainable from the face of the statute and the legislative history is less than conclusive, it seems that the courts would, in all likelihood defer to H.E.W.'s interpretation and uphold the regulations.

It is hoped that this will suffice to provide the information you require.

CHARLES V. DALE, *Legislative Attorney*.

CENTER FOR NATIONAL POLICY REVIEW,
April 7, 1975.

MEMORANDUM

To: Project on Equal Education Rights.
Re Interpretation of Title IX:
The Proper Scope of the Regulations.

A

Hearings before the House Committee on Labor and Education produced much testimony on the pervasiveness of discrimination against women in education. As a result of this and of a generally growing awareness of the position of women, Congress voted to include a prohibition against sex discrimination in the Education Amendments of 1972.

Today there is much discussion of the proper scope of this statutory provision. The regulations proposed by the Department of HEW are soon to be before the Congress where the legislative body is to decide whether HEW's proposed regulations are consistent with the meaning and scope of the statutory authority.

Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, reads in part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> (1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> (2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution whch has begun the process of changing from being an institution which admits only students of one sex to being in institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;
>
> (3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
>
> (4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine; and

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from this establishment has had a policy of admitting only students of one sex.

The debate over this provision centers on the interpretation of the phrase "education program or activity" and thus the scope of the prohibition. Does it prohibit discrimination in the total school program—all of the activities and educational offerings of the school, or just in federal grant programs in education?

Section 902 reads in pertinent part:

". . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such non-compliance has been so found, or (2) by any other means authorized by law. . . .

The controversy over this section revolves around the scope of this termination authority. May HEW terminate funds to (1) all grant programs within a total school program which is found to be in noncompliance, (2) only those grant programs which are themselves specifically found in noncompliance; or (3) any grant program which is affected by discrimination in the overall school program?

In the context of a debate over the proper interpretation of the scope of Title IX, the regulations to be promulgated under it, especially under section 901 and 902, have been the center of a growing controversy. A careful analysis of the statutory language, presents a clear framework for administrative implementation, however. It reveals a structure which embodies the policy concerns expressed during the floor debate on the measure and which is consistent with the previous interpretations of the almost identical Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-2000d(4).

I. *The prohibition in section 901, 20 U.S.C. 1681, against discrimination on the basis of sex in "any program or activity receiving Federal financial assistance" is properly interpreted as prohibiting discrimination based on sex in all aspects of a school program which is receiving Federal financial assistance.*

[1] Title IX created a Federal policy against discrimination on the basis of sex in the field of education. Its purpose was to "provide equal access to men and women to the educational process and the extracurricular activities of the school"[1] by attacking discrimination on several levels: (1) in employment within educational institutions; (2) in admissions to the school programs; and (3) in access to the particular studies and services offered by the school.[2]

The reference in section 901 to the receipt of Federal funds was included not to limit the scope of that prohibition, but rather to establish appropriate grounds for the effectuation of this Federal policy.[3] The same was done in Title IV of the Civil Rights Act of 1964.

[2] As section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, has been regarded as a general prohibition against discrimination based on race, color, and national origin in any program receiving Federal financial assistance, section 901 is a broad general prohibition against discrimination based on sex under any such school program or activity.[4]

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[1] 117 Cong. Rec. 30407.

[2] 118 Cong. Rec. 5812.

[3] The spending powers of the Federal government empower Congress to act in this area, Constitution, Art. I, section 8; *Helvering v. Davis*, 301 U.S. 619 (1937). Additionally, it is clear that Congress may condition is funds on nondiscrimination. *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1936), *Oklahoma v. United States Civil Rights Commission*, 330 U.S. 127 (1946).

Further, it is important to note that the Federal concern in this area relates to rights protected under the fourteenth amendmen's equal protection clause. c.f. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). It does not extend to matters of *pure* educational policy which do not affect these rights.

[4] Section 601 of the Civil Rights Act of 1964 and section 901 of the Education Amendments of 1972 are nearly identical and will often be referred to interchangeably, or together. The same is true of sections 602 and 902 of the respective titles.

In its opinion in *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1967),[5] the fifth circuit referred to the scope of section 601 as follows:

"Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdraw of Federal assistance. . . The Bossier Parish School Board accepted Federal financial assistance in November 1964, and thereby brought its *school system within the class of programs subject to section 601 prohibition against discrimination*". at 852 (emphasis added).

More importantly this interpretation was clearly accepted by the Supreme Court in its recent decision in the case of *Lau v. Nichols*, 94 S. Ct. 786 (1974), where the Court held that the San Francisco Unified School District was in violation of section 601 because non-English speaking Chinese students were being denied "a meaningful opportunity to participate in the educational program". *Lau*, at 789. The Court held that section 601 was applicable because "That section bans discrimination based 'on the ground of race, color, or national origin' in 'any program or activity receiving Federal financial assistance'. The school district involved in the litigation receives large amounts of Federal assistance." *Lau*, at 788.

Three Justices concurred, relying not on Title VI itself, but on the scope of HEW's guidelines and regulations promulgated under it. In so doing, they found that the conditioning of federal aid to public schools on circumstances within the education program offered by the school district was within the authority of sections 601 and 602. The guideline used the term "program" in its broadest sense:

"Where inability to speak and understand the English language excludes national original minority group children from effective participation in the *educational program offered by a school district*, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595 (emphasis added).

Yet the Court held that it met the test set out in *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973) which stated that "the validity of a regulation promulgated under a general authorization provision such as section 602 of Title VI 'will be sustained as long as it is reasonably related to the purposes of the enabling legislation'. *Thorpe v. Housing Authority of the City of Durham*, 393 U.S. 268, 280–281 (1969)". *Lau*, at 790.

In setting up an identical administrative structure and employing virtually identical statutory language, it is apparent that the intent of the legislature which enacted this provision in Title IX was to provide coverage of the same nature as that which had been provided under Title VI.

[3] Policy concerns which conflicted with the major policy under consideration, that of prohibiting sex discrimination in education, prompted several amendments to the original versions of Title IX. The central concern was the impact of this prohibition on various institutions of higher education. As a result, Congress limited the scope of section 901. Each of the amendments is as an exception to its general prohibition against sex discrimination.[6] The problem having thus been considered and these exceptions alone having been embodied in the statutory language, they remain the only limits on the scope of section 901.

[4] The limitations on the scope of section 902, the statutory sanction for noncompliance with section 901, are independent from and do not limit the general prohibition of section 901.

(a) The single case to discuss the proper definition of the term "program"

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[5] The Court in *Bossier* was faced with a school board's refusal to permit the children of Negro Air Force personnel to attend their integrated schools. The board claimed that it had no responsibility to provide equal education to the children, arguing that since the children lived on a Federal base they were not within their jurisdiction and thus were not protected by the equal protection clause of the fourteenth amendment.

The fifth circuit affirmed the district court's finding that the board, as a result of con- under them, was stopped from denying its obligations to provide education to these tractual assurances which it had signed and its subsequent acceptance of Federal monies children on the same grounds that they provided it to their own children. The circuit court went on, however, to state three independent additional grounds on which the district court could have reached the same result. Among them was section 601 of the Civil Rights Act of 1964.

[6] The specific references in these amendments to "admissions to educational institutions" indicate an intent that the prohibition of the section not be limited to programs which are directly receiving Federal funds. If it had been intended to be so limited, there would have been no need to make reference to other aspects of the total school program, i.e. admissions programs; the section would not apply to any of them by definition.

414 F.2d 1068, (5th Cir. 1969)[7] considers it only in the context of the termina-
in Title VI, *Board of Public Instruction of Taylor County, Florida v. Finch,*
tion provision, section 602; its holding thus does not affect the proper scope of the general prohibition, section 601.

In discussing the use of the term in section 602, the court said:

"In the first place, the statute requires that termination be limited 'to the particular program, *or part thereof*' [emphasis added], found not in compliance with the Act. Even if 'program' meant school program, as HEW contends, some meaning would have to be assigned to the parenthetical phrase 'or part thereof'. The logical candidate would be the individual grant statutes which constitute the socalled 'school program'." *Finch*, at 1077.[7a]

Although the court eventually found that "program" in section 602 referred to grant programs, it never completely dispensed with this interpretation. Instead, the court used it as secondary support for its holding that HEW must make findings of noncompliance on a grant by grant basis before terminating funds.

A consideration of the scope of section 601, an analysis not undertaken by the *Finch* court, lends considerable additional weight to this interpretation. *Bossier* and more importantly *Lau*, both cases which examined section 601, support it by their acceptance of the term "program" in section 601 to mean the total school program.

Finally, with section 602 providing for the narrowest possible pinpointing of the recipient, interpreting the phrase "program, or part thereof" in any way other than that quoted above would result in an unmanageable approach—the division of grant monies by classroom for purposes of terminating funds.

(b) Section 902, which reads in part "such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found", was language first used in Title VI of the Civil Rights Act of 1964. It was included there, not to limit the scope of the prohibition against discrimination, but rather to limit the scope and the impact of the termination of funds. Its purpose was to create a balance beween the desires to use the termination power to serve as a leverage to end discrimination and to not use Federal funds to further discrimination and the desire not to unduly harm the innocent beneficiaries of the Federal monies.[8] Section 602 may therefore reasonably be given a more limited interpretation than that of the general prohibition of section 601.

(c) In interpreting a legislative act, it must be assumed that the legislature intended that every word which it used be given effect. In including the phrase "or part thereof" in section 902, but not in sectoion 901; in including the word "activity" in section 901, but not in section 902; and in narrowing down the recipient to whom funds may be cut-off with such precision, it is further clear that sections 902 and 901, were intended to have different scopes—section 901 to effect a general prohibition of discrimination; section 902 to narrow the effect of the fund termination to those areas where discrimination actually affected the learning environment. The limiting language of the termination provision then does not affect the scope of the prohibition.[9]

II. *Section 902 provides for the termination of funds to those "programs or part thereof", (a) in which specific discrimination has been found, or (b) which are so infected by a discriminatory environment that they thereby become discriminatory themselves.*

[1] The provisions for pinpointing the termination of funds limit the impact of this sanction. Section 602/902 was thus carerully structured to protect innocent

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[7] In *Finch*, the Board of Public Instruction of Taylor County, Florida challenged HEW's actions in terminating Federal funds throughout the district without making specific findings of noncompliance within each specific grant program. The circuit court held that such findings were necessary, but noted that a program could be in noncompliance as a result of discriminatory actions in other parts of the school program.

[7a] Under this interpretation, a school's Federal grant programs as well as all of its other offerings, would be treated as component parts of its "education program and activities", as that phrase is used in section 601.

[8] *Finch*, at 1075.

[9] Section 901 can stand apart from the statutory sanction, section 902. Enforcement of the general prohibition is possible outside section 902, as in *Lau*.

Under the common law doctrine, "action upon statute", section 901 creates a private right of action for those "for whose especial benefit the statute was enacted". *Texas and Pacific Ry. v. Rigsby*, 241 U.S. 33, at 39 (U.S. 1915). Thus, even if the agency's power to terminate funds in a given instance were limited under section 902, redress would be available in the courts to effectuate the statute's general prohibition against discrimination.

beneficiaries at the same time that it was designed to terminate funds to prevent them from being administered in a discriminatory manner or from having a discriminatory effect. The interpretation presented by the court in *Finch* properly balances these conflicting policy considerations.

"If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, the termination of such funds is proper. But there will also be cases from time to time where a particular program within a State, within a county, within a district, even within a school (in short, within a political entity, or part thereof) is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others . . . In this way the Act is shielded from a vindictive application". *Finch*, at 1078.

Funds to a school would not be completely terminated upon the finding of an instance of discrimination. However, all funds which supported a program which was infected by a discriminatory environment, or which were themselves used in a discriminaotory manner, would be.

[2] The possibility that discriminatory action in one area of the school program may have effects on other aspects of the program is accepted by the *Finch* court's interpretation. Although this recognition came under Title VI, the concept of "taint" or "infection" is equally relevant to problems of sex discrimination under Title IX. Some specific examples illustrate how this concept may work in practice.

(a) A high school counseling office, which receives no Federal funds, feels that women should be trained to be secretaries and hairdressers, not auto mechanics and woodworkers. As a result, the office refers the female students only to those vocational education classes (Federally funded) which teach "proper female skills". This vocational education program would thus be so infected by discrimination within the school program that the termination of funds would be proper under *Finch* and under the purposes of Title IX, even if the program itself had not been found to be administered in a discriminatory manner.

(b) The library system in a university receives no Federal funds. They feel that female students distract the male students from studying, so they allow them access to just one of the system's four libraries. Such a policy on the part of the administration would create a discriminatory atmosphere which would have ramifications throughout the educational program of the university, which would infect the entire university community.

(c) The athletic department receives no Federal funds. Because they have a lot of work to do to get their teams in shape for the varsity seasons, they close the doors of their facilities to women for all but two hours a week. (Only 30% of the male students are involved in varsity athletics, yet all of them are allowed free use of the facility.) Again, such a policy would affect the total school environment. The feelings of inferiority, or second-class citizenship within the school community would pervade the whole of the female students' activities. And probably, more importantly, such explicit policies would affect the attitudes with which the women students were accepted by their male counterparts and by the faculty. Carryover into all aspects of the school environment would thus result.

"Infection" exists on a continuum from instances where the discriminatory impact on other programs is clear, tangible and measureable, i.e. example 1, to instances where it is highly intangible, largely psychological and not clearly measureable, i.e. example 3's impact on the purely academic aspects of the school's program. Although *Finch* indicated that the agencies must make findings of fact as to the "infection" of the grant programs by practices elsewhere in the school program before terminating funds, it did not reveal the point at which this "infection" occurs.

Where along the continuum is a program which is receiving federal financial assistance "so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory"? The vocational education program is clearly so affected by the first example, but what about the effect of an example 2 situation on a federal research grant program? Would it be so affected that it thereby became discriminatory?

The court never considered these questions in *Finch;* their answers are not clear. It is clear, however, that the concept of 'infection" is equally relevant to sex discrimination and thus valid under the termination provision of Title IX. As was recognized by the fifth circuit's decision in *Finch*, the policies and purposes behind Title VI—and thus Title IX—require it, and the agencies have been entrusted with the task of determining at least initially, where along the continuum a program will be deemed to be infected.

III. *Policy Considerations/Conclusions*

Title IX should be interpreted in a manner which gives effect to all of the expressed policy concerns—the desire to (a) prohibit sex discrimination; (b) prevent Federal monies from being used in a discriminatory manner or from having a discriminatory effect; and (c) avoid unduly harming innocent beneficiaries by too extensive a fund termination policy. To do so it is necessary to attribute broad scope to sections 901 and 902. To limit section 901's prohibitory reach to only those specific parts of the school program which are directly receiving Federal funds would cut the school program and activities up into so many pieces that an effective attack on sex discrimination would be virtually impossible. It would create a plethora of nooks and crannies into which to place, and successfully shield, discriminatory intent and effect. A narrow reading of section 902 would fail to balance the competing policies embodied in it, as well as place an extraordinary burden on private parties to seek change through other than this administrative structure. Such a result would destroy the purpose and design of the Title VI/Title IX structure. Further, to tie a narrow reading of section 901 to a restricted reading of section 902, would deprive Title IX of any effective impact on the problem of sex discrimination in education.

Therefore, a consideration of the law and policy underlying Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, et seq. yields the following conclusions:

(1) Section 901 is a general prohibition, prohibiting discrimination based on sex in all aspects of the total school program which is receiving federal financial assistance; and

(2) Section 902 provides for the pinpointed termination of funds where a grant program is being administered in a discriminatory manner or where it is so infected by discrimination elsewhere in the school program that it thereby becomes discriminatory.

EMILY MARWELL.

Ms. CHISHOLM. At this point we are going to hear the testimony of Representative Stewart McKinney, a Representative from the State of Connecticut. We are very glad to have you appear before us.

STATEMENT OF HON. STEWART B. McKINNEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CONNECTICUT

Mr. McKINNEY. I am very happy to be here, Madam Chairlady. I appreciate the opportunity to testify.

Equal opportunity in education is fundamental to equality in all human endeavors. It is education that determines one's attitudes, beliefs, and positions in society. Historically in the United States and indeed the world, women have been viewed as second-class citizens and not quite as worthy as their male counterparts. Madam Chairlady, it is to correct this situation that I urge the swift implementation of the title IX regulations.

The crucial clause of title IX states that "no person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal assistance."

Like the provisions of the Equal Rights amendment, it is difficult to understand how 200 years after the Declaration of Independence, over 100 years after the 14th amendment, and over 50 years after women were granted full political equality, we are still discussing whether women should be entitled to the same educational and social opportunities as men.

The major controversy over title IX is in the area of athletics. While allowing that women should receive equal educational opportunities, many believe that this should not include sports. Although almost all agree that physical activity is necessary for both sexes and that a healthy body complements a healthy mind, in the area of sports the male sex has traditionally been afforded a greater chance for physical development.

It is not unusual that the athletic culture of a society reflects the society's normative values. Competitive sports require discipline, leadership, aggressiveness, all traditionally considered male characteristics. Women are encouraged to be weak and passive. A high level of achievement in sports is a contradiction of the restrictions of the female role. Cultural myths have determined what is right for men and women. By stereotyping a whole caste of people we are limiting their growth and potential.

It is true that men and women now differ in their athletic ability. Height and weight are often determinants of athletic skill. The average man is more likely to possess greater strength and speed than the average woman. The average woman has greater precision and agility than her male counterpart.

However, making decisions based on averages is limiting and ignores the reality that many women are better athletes than the average man. We know that until puberty, girl and boy children have roughly the same athletic capacity. After this point there is a significant difference in their ability in most sports. However, until we stop punishing girl children for being tomboys and allow their full participation in scholastic athletics, we will never know their true capacity as sportspersons. Indeed in the Soviet Union where femininity is not a premium value, women athletes are far superior to our own.

The blatant discrimination against women in intercollegiate athletics should end. Although the title IX regulations do not call for equal aggregate expenditures, I believe that we can achieve a picture of the gross inequality that exists by looking at the differences in expenditures in men's and women's athletics. The average institution of higher education in the United States budgets less than $1 a year per woman student on sports. Indeed in 1975 the women's total intercollegiate athletic budget was only 2 percent of the men's total. In the larger "power" schools discrimination is even more blatant. For example Ohio State University spent 1,300 times more for their men's athletic program than for women's sports.

The regulations established by HEW and approved by President Ford are necessary steps in ending sex discrimination in education. As Secretary Weinberger has stated, they enhance the opportunity for women while allowing schools the flexibility they need to keep competitive sports alive. They are not, as the NCCA would have us believe, a blow to revenue-producing sports nor will they cause the destruction of existing men's athletic programs. However, they are a legislative mandate for quality athletic programs for women.

I believe that much of the controversy over title IX involves a misunderstanding of the intent of the regulations. In all areas except contact sports, equal athletic opportunity should be provided for both sexes. As I noted earlier, title IX does not require equal expenditures, although the regulations do mandate an investigation into a failure to provide necessary funds for one sex. A school must evaluate whether its athletic program reflects the interests and abilities of both sexes.

They must see that supplies, equipment, games, and practice schedules, coaching time, locker rooms, facilities and training services provide men and women with an equal opportunity to participate in athletics.

What does this mean? It does not mean that women must be allowed to play on all-male teams. It does mean that if a woman is interested in playing a competitive sport and a woman's team in that area does not exist she must be allowed to compete for a position on the team if the school has limited female participation in the past. A school might provide separate teams or one team based on competitive ability. In situations where one team cannot accommodate the interests and abilities of both sexes, separate teams should be provided.

All contact sports, which are the major revenue-producing sports, are exempt from these regulations. Women do not have to be allowed the chance to try out for such games as football, basketball, and ice hockey, nor do comparable sports have to be offered. This exception renders the complaints of such organizations as the NCCA meaningless.

The tactics of the large universities and athletic organizations have been twofold. They have tried to convince the Members of Congress that what is needed is an economic study of the implications of title IX and that the regulations should not extend to athletics.

Madam Chairlady, an economic study at this time is totally unwarranted. Title IX became law in 1972. It is now 1975. We should delay no longer in its implementation. Discrimination against a class or caste of people is always profitable for those that are perpetuating the discrimination. I am quite sure that slaveowners doubtlessly asked for an economic study of the emancipation proclamation. Nevertheless, freeing people to develop their potential is worth any short term cost.

That title IX rightfully deals with athletics is both a legal and a social issue. The title IX clause of the 1972 Education Act is almost identical in wording to title VI of the Civil Rights Act of 1964. In every court case challenging the boundaries of title VI, it was held that the prohibitions covered every aspect of an institution receiving Federal aid, not just particular programs.

Yet the issue is far more important than legal precedent. Women are an integral part of the universities they attend. To limit the prohibitory effects of title IX to only those areas directly receiving Federal aid allows sex discrimination to continue to exist in many other areas of that same institution. At a time when many of our private institutions are having serious financial difficulties, it is especially important that we assure that women will be treated equally in all aspects of their educational endeavors.

Madam Chairlady, in this Bicentennial Year we must rededicate ourselves to the principles on which our Nation was founded. I can't help but think that a birthday is not a celebration of the past, but a dedication to the future.

It is also International Women's Year in recognition of the significant contributions of women to our history and culture. It is fitting that in this year we quickly implement the title IX regulations and end all sex discrimination in our educational institutions. In this way we will be taking a necessary step in assuring that women may achieve full social and economic equality.

Madam Chairlady, I would like to conclude my testimony on a personal note. I have served on many college and educational boards, including my own two alma maters of Princeton and Yale. There isn't one of these educational institutions that could exist today without massive Federal financial assistance, be it in direct form, be it in tuition payments, be it in tax status, be it in dormitories built, be it in roads built, be it in Government programs in physics and all the other programs. So that the argument that title IX should not cover athletics is patently ridiculous because none of these colleges or universities could afford an athletic program if they didn't receive Federal financial assistance in other areas.

A really personal point: 4 years from September I will have four children in college, three of them young women. I will pay the same amount to send a daughter to Princeton as I would a son. Is it fair that I, as a father, pay the same amount to educate one of my daughters and yet not have her receive the same facilities and chances and same opportunities?

Just as an amusing sidepoint, I sit on the board of a small school in Westport, Conn., that was all young ladies, kindergarten through high school. The young ladies in the school voted 95 percent in favor of allowing the male sex to join them in their hallowed halls. Were we at that point to refuse to build a new locker room for the boys or refuse to let the boys have basketball court room, refuse to let the boys have tennis court room, even though the boys were less than 10 percent of the school? I think not.

It seems absurd to me that in a nation dedicated to the Declaration of Independence and the Constitution and the Bill of Rights 200 years after our founding we are still discussing voting rights bills—still discussing women's rights—still discussing gay rights. We are still arguing about the very fact that never confused our forefathers, and that is that all men—and that is a generic term—are created equal.

Ms. CHISHOLM. Thank you very, very much for your testimony. I think that your testimony was really quite powerful and quite apropos. I wish that there were many other individuals who tend to be rather complacent and tend to be rather shocked by potential changes in this society having the opportunity to have heard your testimony.

The NCAA is raising many arguments which are disproportionate to what the entire title IX is all about. They have been chiefly the beneficiaries in terms of the educational revenues and procedures which have not admitted women before.

Mr. MCKINNEY. Nobody that has had an entrenched autocracy likes to see it shaken a little. I don't think the coaches want to tell their football players, "You can only have three new uniforms this year instead of the five we have been giving you." Perhaps they won't be able to give them that special dining room reserved only for the athletic elite. Perhaps they won't be able to give them that special dormitory reserved only for the athletic elite. But I as one who was an uncoordinated student would be delighted to see them live the way the rest of us did.

I think some coaches don't want to realize that there are going to be women coaches that are going to be at the coaching meetings and are going to have a say in the discussion.

We are talking about institutions that look to the United States for help and I think they must live under the tenants of the United States of America.

It might interest the Chairlady to know that until 6 months ago—I am not a lawyer—my legal staff aide was a Mr. George Pizaka, who became coach of one of the most powerful basketball teams in our State, Fairfield University, he now represents three athletic associations and I am still testifying the way I am.

Ms. CHISHOLM. Thank you very much, Mr. McKinney. Mr. Simon.

Mr. SIMON. I have no questions. I just commend you for the general thrust of your testimony. It was an excellent statement.

Ms. CHISHOLM. Thank you very much for your appearance before the Committee.

Mr. MCKINNEY. Thank you for your interest and listening to me.

Mrs. CHISHOLM. The Chair recognizes my colleague from New York, Representative Abzug.

STATEMENT OF HON. BELLA ABZUG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Ms. ABZUG. Congressman O'Hara, members of the subcommittee, I would like to thank you for the opportunity to appear today to testify on the regulations implementing title IX of the Education Amendments of 1972.

These long-awaited regulations represent a necessary first step toward the elimination of sex discrimination in educational programs and activities receiving Federal financial assistance. We all know how serious and pervasive a problem sex discrimination in education has been. The hearings held by former Congresswoman Green as Chair of this subcommittee outlined in detail many instances of discrimination against women and girls in this area.

Qualified women have sometimes been frustrated in their attempts to gain admission to, or become employed at, educational institutions because of their sex. Opportunities for women to participate in academic, extracurricular, and other activities offered by educational institutions have often been severely limited. For example, women's programs received only about 2 percent of the intercollegiate athletic budget in 1974–75, according to a report prepared by the American Council on Education. Advancement of women to supervisory positions in the education system has been made difficult because of sex bias.

To illustrate, the most recent survey conducted by the National Education Association revealed that while two-thirds of classroom teachers at the elementary and secondary level are women, only 13.5 percent of principals and one-tenth of 1 percent of superintendents at this level are women. In fact, the situation worsened between the time their two most recent surveys were conducted, in 1970–71 and in 1972–73.

I would like to state at the outset that although these regulations are not perfect, I strongly urge that they not be disapproved by Congress, either in whole or in part. Despite their limitations, the regulations as they now stand will force institutions to make sweeping changes aimed at eliminating sex bias in the conduct of educational programs and activities.

Let's take a look at what the regulations will do. In the area of admissions, institutions will no longer be able to give preference to one person over another solely on the basis of sex, nor will they be able to apply numerical limitations on the number of persons of either sex who may be admitted. This will mean that women will no longer have to be more qualified than the men against whom they are competing for admissions to colleges and universities, as has sometimes been the case in the past. Nor will qualified women be refused admission because the "quota" for women has already been filled. In considering applicants for admission, institutions are prohibited from applying rules concerning parental or marital status which treat persons differently on the basis of sex. Institutions will not be able to have policies of admitting married men, but not married women, or admitting men with small children, but not women in the same situation.

Once students are admitted to an institution, they may not be treated differently on the basis of sex. Rules of behavior and appearance, eligibility for in-State fees or tuition, for example, may not be different on the basis of sex. Access to course offerings will not be restricted on the basis of sex, so that girls who wish to take industrial arts courses and boys who wish to learn about such areas as home economics will not be prevented from doing so.

One critical area covered by the regulations is counseling and use of counseling materials. Unfortunately, girls and women are often channeled into occupations which are "traditionally female" and are not encouraged to consider a range of options as broad as those presented to males. Sex bias can occur both in counseling itself, and in the use of sex-stereotyped counseling materials, and can affect men's choices as well as women's. The regulations will compel institutions to eliminate such sex bias, a necessary step if both men and women are to be given the opportunity to exercise true choice in making educational, as well as occupational and professional, decisions.

Employment at institutions is another area covered by the regulations. Institutions may no longer make employment decisions in a manner which discriminates on the basis of sex. Once individuals are employed, these regulations would mandate that they be treated the same in terms of promotion, compensation, job assignments, fringe benefits, as well as a variety of other job-related matters. Of particular note is the fact that pregnancy must now be treated like any other temporary disability for employment purposes.

These changes are, of course, long overdue. And although the regulations are not all that some of us hoped they would be, they do represent a good beginning. Title IX, and the implementing regulations, are a recognition at long last that girls and women should be given the same opportunities as men and boys to develop intellectually, socially, and physically within the context of educational programs and activities. No longer will the fact of sex be an excuse to limit a women's chance to get a good education or a good job at an educational institution, or to participate in a course of study or an educational program of her choice.

A great deal of attention has been focused on the application of title XI to athletic programs offered at educational institutions. Although athletic programs are only a small part of the activities affected by the regulations, this somewhat narrow issue seems to have provoked the greater part of the debate on the title IX regulations.

Apparently, some people think that the regulations should not deal with athletic programs at all. I would refer to those who suggest that athletics are beyond the reach of title IX to the General Education Amendments of 1974, Public Law 93-380, which directed the Secretary of HEW to prepare and publish "* * * proposed regulations implementing the provisions of title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted programs, which shall include, with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports."

Additionally, under title VI of the Civil Rights Act of 1964, the wording of which is virtually identical to that of title IX, courts have held consistently that athletic programs offered by educational institutions are covered by title VI, as they constitue an integral part of the institution's educational program.

It has been suggested that schools are already voluntarily providing equal opportunities for women in sports, and that further study is needed on the impact of these regulations on intercollegiate athletics before they go into effect. Regarding the claim of voluntary action in this area, I can only say that if there was a history of voluntary compliance, we would hardly need to be discussing these problems today. On the question of the need for further study, I must point to the fact that there has been ample time for real evidence of the negative impact of this law on male athletic programs to be produce in the 3-year period since the law was passed.

It is hard to understand why anyone would oppose giving girls and women equal opportunities to develop their physical capabilities. Athletics are healthy, for both men and women. Participation in athletics is beneficial, both for the individual and for society. I hope that we will soon see the day when girls and women are participating fully in athletics at all levels. These regulations, while hardly going as far as they could, do provide a minimum basis for this to happen.

There are a number of issues at stake in the regulations that seem to have escaped public notice as a result of the emphasis on athletics programs. These include areas in which HEW has taken a narrow view of what is consistent with the law. I would like to discuss briefly a number of these concerns, which I hope can be resolved in the future on the basis of experience with the implementation of the law.

One of these areas is the definition of professional and vocational programs contained in sections 86.2 (m) and (n). HEW has interpreted the statute, which exempts the admissions policies of private undergraduate colleges, while covering professional and vocational programs, to prohibit the coverage of admissions policies of professional and vocational programs offered by private undergraduate institutions. The statute is admittedly ambiguous on this point, but a broader view would have resulted in a prohibition on discrimination in admissions to those vocational and professional programs offered by private undergraduate institutions which serve as entry points for an occupation or profession. Because this conflict in the statute exists, an amendment to the legislation would be helpful in clarifying congressional intent in this regard.

The exemption for contact sports in section 86.34, dealing with access to course offerings, is a provision that I hope HEW will monitor closely. It is of the greatest importance that we insure that access to curricular programs is available equally to members of each sex, and that exemptions are made only where there are clear and compelling reasons. Experience with the law will give HEW a basis for evaluating the necessity for any exemptions in this area.

With respect to the provision of an up to the 3-year "adjustment period" for compliance for physical education classes, I think that HEW has been more than reasonable in accommodating the needs of institutions. I hope that institutions will make every effort to comply as expeditiously as possible with the law in this, and every regard.

Two sections dealing with financial assistance, 86.31(c) and 86.37 (b), would allow institutions to continue to administer sex-restricted scholarships established under foreign or domestic wills, trusts, or similar legal instruments. HEW has clearly made a reasonable effort to provide that the award of such scholarships does not result in an overall discriminatory impact.

In the case of sex-restricted scholarships established by foreign trusts for study abroad, HEW requires that institutions provide "reasonable" opportunities for members of the excluded sex to study abroad. In the case of other sex-restricted scholarships, institutions must "pool" sex-restricted and unrestricted scholarships to insure that the overall effect of awarding such scholarships is not discriminatory. In line with the statute, HEW has provided that equity in terms of the quantity of scholarships is provided.

One consideration not taken into account by HEW is whether "prestige" is a factor which must be considered in the award of scholarships. This is a difficult question, because prestige is an intangible factor that is difficult to measure. Experience with the implementation of the law will provide us with a basis for deciding whether mandating equity in prestige, as well as in quantity, is necessary and possible.

The athletics section, 86.41, is, as I noted earlier, a first step toward equal opportunity for women in sports. I regret that two commendable provisions which appeared in the proposed regulations have been deleted. The first would have required an annual determination of student interest in sports. The second would have mandated affirmative efforts with regard to members of a sex for which athletic opportunities have previously been limited to inform members of such sex of the availability of athletic opportunities, and to provide support and training activities for members of each sex designed to improve their capabilities and interests in participation. These provisions would have aided institutions in bringing themselves into compliance with the law. HEW might review these provisions, in light of experience with the law, to see if such mechanisms are useful and desirable.

The virtual exemption for contact sports contained in this section will provide more than ample protection for the revenue-producing sports. In general, the athletics section allows a wide variety of options and a great deal of flexibility in providing equal opportunities for men and women.

I am concerned about the fringe benefits section, which provides recipients the option of offering plans with either equal periodic benefits for members of each sex, or equal contributions to the plan by the recipient for members of each sex. Three options were open to the Department in this regard. The first option, which was chosen, is in line with the Office of Federal Contract Compliance guidelines for Executive Order 11246. The second, requiring the payment of equal periodic benefits, would have reflected the approach of the Equal Employment Opportunity Commission in administering title VII of the Civil Rights Act. The third would be to require that there be no differences in benefits or contributions on the basis of sex, and that where actuarial tables are used in computing employee benefits, unisex tables be used.

I am pleased that the President has directed that a report be prepared by October 15 recommending a single approach. I personally feel that the third approach is most equitable, and hope that the report requested by the President will reflect this view. Subsequently, I would hope that the regulations will be revised to adopt this approach.

There are four main areas in which the final regulations represent an improvement over the proposed regulations. Section 86.3, which now requires institutional self-evaluation to assess policies and practices for evidences of discrimination, and to take steps to modify sex discriminatory practices, is an excellent way to force institutions to focus on problems of discrimination. The 1-year deadline for the completion of such an evaluation will help to speed compliance with the law and with the regulations.

Section 86.8, which now requires that institutions establish internal grievance procedures, is a good addition to the proposed regulations. Such procedures could be a reasonable way of handling complaints when complainants choose to utilize them. At the same time, they are not unduly restrictive, and allow institutions to exercise discretion of establishing practices that meet the unique needs of the institution.

The section dealing with counseling and use of counseling material, 86.36, has been revised to require institutions to establish procedures to review counseling materials for sex bias. This is a positive change from the proposed regulations. However, I am disappointed that review of textbooks and curricular materials was not included in this section.

Finally, I am pleased that section 86.57 has been revised to remove some unnecessary qualifications on the treatment of pregnancy as a temporary disability. The final regulations are more equitable, and reflect greater consistency with the law, in this respect.

In closing, I would like to reaffirm my support for these regulations, and stress once again their importance as a first step in eliminating sex discrimination in all aspects of education. It has been 3 years since title IX was enacted. We can afford to delay no longer in making equal educational opportunities a reality, rather than a promise, for the girls and women of this country. While I hope that the regulations are revised in certain areas at some point in the future on the basis of experience with the law, I see nothing in the regulations that are inconsistent with the law, and urge that they be allowed to go into effect on July 21.

STATEMENT OF HON. DONALD M. FRASER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MINNESOTA

Mr. FRASER. Mr. Chairman, I appreciate the opportunity to express my support for the proposed title IX regulations presently before this committee. I believe they represent an important first step in eliminating sex discrimination in educational institutions and activities benefitting from Federal aid. Although added steps must be taken in the future, I urge the subcommittee to approve these regulations in toto.

The severe damage inflicted on all women by sex discrimination is only beginning to be widely understood. It is clear, however, that the Congress has an urgent responsibility to lead the way in eradicating such practices. Sex discrimination has no place in our free society. There is no better place to start eliminating it than our educational institutions. Schools are a major force in transmitting the values and goals of our society. The regulations before you will help to assure that the more than one-half of our children who are female will no longer be taught that they are second-class citizens, that whatever their abilities and talents, they will now be able to enjoy full access to an open, vigorous participation in the rewards of American life.

A number of the opponents of these regulations have focused on the sections which deal with physical education and sports. The answer to many of their points can best be seen in a recent announcement by the University of Maryland. This university, which has a large and expensive athletic program for men, is already beginning to comply with the new Federal regulations—without further delay. The added costs will be covered by a nominal rise in athletic fees. Thus the spirit of the law and regulations as proposed can be met, in my judgment, by other institutions as well.

While the HEW regulations omit some provisions which would strengthen their effectiveness in eliminating sex discrimination in the institutions covered by title IX, the regulations do attack discrimination firmly in most aspects of school activities. Insofar as they accomplish this, they represent a major contribution to education in the form of equitable treatment for women.

Therefore, I urge the committee to complete the implementation of this statute which Congress first passed 3 years ago.

STATEMENT OF HON. PATRICIA SCHROEDER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF COLORADO

Mrs. SCHROEDER. I would like to take this opportunity to comment on the regulations issued by the Department of Health, Education, and Welfare, to implement title IX of the Education Amendments of 1972. Until the fall of 1971, when titles VII and VIII of the Public Health Services Act were amended to prohibit sex discrimination in admissions to federally funded health training programs, there was no Federal legislation prohibiting sex discrimination among students at any level of education. Female students could be, and were, legally excluded from schools and colleges, admitted on a restrictive quota basis, denied admission to certain classes, and subjected to a variety of other discriminatory practices. Females had no legal recourse when educational institutions denied them the opportunity that was regarded as the "birthright" of their brothers. Then, in 1972, Congress continued and strengthened the attack on sex bias in education by adding title IX to the Education Amendments of 1972 to eliminate sex discrimination in any education program or activity that received Federal financial assistance. I am in agreement with the intended purpose of title IX and, although I believe the final regulations fall short of providing a full measure of equal educational opportunity for women, they are at least a step in the right direction.

First, I would like to say that I am shocked by the hysteria that has surrounded these regulations, especially those relating to sports and athletic programs. I have reviewed the testimony of football coaches, athletic directors, and sundry other persons who are convinced that affording women equal athletic opportunity will weaken revenue-producing sports and will eventually damage all intercollegiate athletics. The specter of that sacrosanct institution, bigtime football, dying at the height of its glory, of football heroes in tattered uniforms playing to half-empty stadiums, are alarmist tactics that serve only to cloud the issue. No one has brought forth any data demonstrating that this would, or could, even be the case.

I do not think a moratorium of the application of title IX to intercollegiate athletic programs is warranted. In my opinion, the regulations pertaining to athletics are not inconsistent with title IX; the regulations are clearly within its authority and strike a reasonable balance between progress in equal educational opportunity for women and providing substantial protection for contact sports such as football.

For example, schools may allow women to try out for men's contact sports teams, such as football and basketball, but are not required to do so. Neither must women partake of the benefits accorded men on those teams. If enough women wish to participate in a contact sport, separate teams for contact sports will be formed. Furthermore, schools are not required to spend the same amount of money on men's and women's sports programs. True, the regulations require that equal opportunity take into account such things as provision of coaches, training facilities, locker rooms, equipment, playing facilities, and publicity, but I do not think such regulations are excessive. On the contrary, the regulations give women long-denied resources that are essential to build, sustain, and promote women's athletics, and to make women's athletics capable of generating substantial interest and, therefore, substantial revenues with which to support their programs. In fact, spectator interest is already growing and, with expanded opportunities, interest and skill among women is increasing dramatically.

The excessive amount of attention and publicity given to the regulations affecting sports and athletics has obscured the many other important areas that will be affected by the title IX regulations. The title IX regulations will also ban discrimination on the basis of sex as it applies to admissions policies, composition of classes, housing, financial aid, and employment practices.

In all of the areas addressed by the title IX regulations, women have been subjected to discriminatory practices, but I am especially concerned with the employment practices of our educational institutions. Although women constitute the majority of professional employees in elementary and secondary education, they are not fairly represented in administrative positions. They are crowded at the bottom of the professional ladder, and their representation is decreasing. From 1970 to 1971, 6 percent of all school superintendents were women; from 1972 to 1973, only 1 percent were women.

A statement made by Margaret Dunkle and Bernice Sandler of the project on the status and education of women under the Association of American Colleges in an article reprinted in the November 19, 1974, Congressional Record puts the issue in a nutshell:

> Differential treatment of men and women exists in almost every segment and aspect of our society. Perhaps it is the most damaging, however, when it appears and is transmitted by the educational institutions which are supposed to provide all citizens with the tools to live in a democracy.
>
> In the past twenty years, it has become painfully clear that equal educational opportunity will become a reality only if it is supported by strong and vigorously enforced federal legislation.

It is my hope that Congress will permit title IX regulations to go into effect immediately. To do otherwise would be to thwart the progress toward equal educational opportunity for women that has already been made.

Ms. CHISHOLM. The hearing stands adjourned until 2 p.m. tomorrow afternoon in this room.

[Whereupon, at 4:32 p.m. the subcommittee adjourned, to reconvene at 2 p.m., Tuesday, June 24, 1975.]

SEX DISCRIMINATION REGULATIONS

TUESDAY, JUNE 24, 1975

House of Representatives,
Subcommittee on Postsecondary Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met at 2:05 p.m., pursuant to recess, in room 2175, Rayburn House Office Building, Hon. Paul Simon, presiding.

Members present: Representatives Simon, Andrews, Blouin, Mottl, Hall, and Buchanan.

Staff members present: Jim Harrison, staff director; Webster Buell, counsel; Elnora Teets, clerk; Charles Radcliffe, minority counsel; and Richard Mosse, minority counsel.

Mr. Simon. The hearing will come to order.

We will continue receiving testimony relating to Title IX regulations of Public Law 92-318. We are asking Ms. Lillian Hatcher of the United Auto Workers to testify first.

We welcome you here, and I welcome you personally as an old friend. It is good to have you here, Ms. Hatcher. Please proceed with your statement.

STATEMENT OF LILLIAN HATCHER, INTERNATIONAL REPRESENTATIVE, UAW WOMEN'S DEPARTMENT, DETROIT, MICH.

Ms. Hatcher. Good afternoon. My name is Lillian Hatcher. I am an international representative in the women's department of the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW. I am appearing today on behalf of Odessa Komer, who is an international vice president of the UAW.

The UAW has within recent years been selected as the collective bargaining representative for several thousand clerical, technical, and professional employees at Michigan colleges and universities. We represent these workers at Oakland University, Eastern Michigan University, and recently became the representative of 3,000 workers at the University of Michigan.

As part of her vice-presidential duties, Odessa Komer oversees the contracts with these institutions which are subject to the provisions of title IX of the Higher Education Amendments of 1972.

In addition, Vice President Komer directs the women's department, which was created to foster equal opportunity regardless of sex. The women's department has a long-standing concern for laws affecting women's job right, which includes the influence that education has upon those rights.

Furthermore, the UAW as a whole has an interest in providing educational and employment opportunities which break down sex-based barriers to create a better society for all of us. I appear before you, then, on behalf of present workers who are members of our union, and on behalf of future workers who are still in school.

The UAW women's department has followed title IX carefully and we cannot overemphasize this law's importance to achieving sex equality in this country. We submitted comments on Secretary Weinberger's proposed regulations last fall, and would like to commend the Secretary for considering and incorporating many of the comments submitted by the UAW and other groups. While we still feel certain provisions of the regulations need amendment, they are basically sound and should become effective on July 21, as intended.

We need these regulations now. Next week, on June 26, title IX will celebrate its third birthday in terms of its effective date. But the birthday will be a party without horns and streamers, for without guiding regulations, title IX is a meaningless shell. We have now waited 3 years—3 years too long.

A vote against these regulations, though imperfect, is a vote against women. We urge you to look beyond the alarmist cries of powerful athletic association lobbyists who would gut this entire act by raising a red flag on one particular section that engenders their paranoia.

These proposed regulations are far from radical. They merely explain the implementation of an already-enacted congressional policy, to create equal opportunity for both sexes. The UAW urges Congress not to disapprove these regulations which were signed by President Ford.

Our overall support, however, should not be read as total satisfaction with each and every regulation. Briefly, I will touch on the major issues which concern us most as a labor organization. Those issues are the treatment of fringe benefits, especially pensions; references to collective bargaining agreements, especially regarding seniority; the provisions requiring establishment of a grievance procedure; the exemption of private undergraduate vocational schools from nondiscrimination in admission; the definition of a bona fide occupational qualification exception; and the decision to omit coverage of any curricular materials.

The regulations now allow fringe benefit plans to provide for either equal periodic benefits or equal contributions by the employer for members of each sex. We urge the government to adopt a uniform approach on this issue by having all agencies follow the sound guidelines developed by the Equal Employment Opportunity Commission. Provision of equal benefits is the only way to insure equal treatment regardless of sex.

A brief look at income data shows why the subject of fringe benefits is of such importance. According to the U.S. Bureau of the Census, 1973 statistics, regarding persons age 65 and over, 16.8 percent of female heads of the household had incomes below the poverty level, while only 9.4 percent of male heads of households had similarly marginal incomes.

Some have advocated allowing employers to pay women lower retirement benefits on the theory that women live longer, hence over a longer period they will recover the same total amount in benefits.

In terms of practical effect, this means that retired women must survive below the poverty level for more years, while their male counterparts are receiving an income sufficient to live their lives out in dignity.

To allow employers to pay unequal benefits to persons of different sexes is a particularly offensive exception to this general rule because no other group is singled out for a similar fringe benefit exception.

It merely perpetuates continued sexual stereotyping by actuaries, who have for convenience sake traditionally followed such a sexual statistical breakdown. It is difficult to imagine HEW adopting a regulation permitting employers to pay different fringe benefits to persons of different races because of demonstrable differences in racial life expectancies.

Yet actuarial statistics show that blacks have a statistically significant shorter life expectancy than Caucasians, and that persons of Japanese and Chinese parentage have significantly longer life expectancies. To advocate employee receipt of benefits in relation to employer costs is to advocate differentiation of benefits among employees by race.

Moreover, requiring computation of actual costs to the employer of all fringe benefits might lead to the conclusion that the cost is lower for women than for men, and that women should therefore receive higher benefits. We do not seek higher benefits for women than for men, nor do we think such a result is any more advisable than higher benefits for men than for women.

It is our position that workers of all races and sexes must receive equal benefits regardless of the risks to which one or more subgroups of workers may be peculiarly susceptible. At a minimum, the employer should be required to base his or her computation of equal contributions per worker on actual costs of fringe benefits per employee, rather than insurance company computations of employer contributions.

For example, the alleged longer life expectancy of women may result in higher pension costs but lower life insurance costs. Moreover, women workers may average fewer dependents than men, and their hospitalization and medical coverage costs may therefore be proportionately lower.

An employer should not be free to compute pension benefits on the basis of cost, providing lower paid benefits to women retirees, while computing medical coverage on the basis of benefits paid, which could have the effect of women subsidizing men while receiving no comparable adjustment themselves.

HEW's decision to allow sex discrimination in fringe benefit contributions is particularly alarming because of the potential impact on such guidelines under title VII and Executive Order 11246. While the regulations purport not to alter obligations under these laws, President Ford has called for reconciliation of the fringe benefit policies of the EEOC, OFCC, and HEW.

With HEW lobbying to defend its approach under title IX, the hard-won rights under title VII are dangerously jeopardized. The labor movement will not stand by for this back-door attack on sex discrimination guidelines under title VII. To meet the purpose of title IX and to protect title VII, HEW must adopt an equal benefits approach in the area of fringe benefits. This should occur when the three agencies meet.

Several portions of title IX's proposed regulations impinge on contracts which labor organizations hold with educational institutions covered by the act. We commend the Secretary for recognizing labor's ever-expanding role in the field of education, and specifically approve the notice which must be given to collective bargaining representatives of the rights and responsibilities spelled out under title IX.

The UAW has long supported and practiced the concept of one unified seniority list for women and men, minority and white. We therefore express strong endorsement of the title IX regulations which further this policy.

The proposed regulations also correctly bar any relationship with a labor union that directly or indirectly has the effect of subjecting employees to discrimination in "job assignments, classification, and structure * * * lines of progression, and seniority lists."

In view of the various assaults which have been mounted recently on seniority systems, the UAW feels clarification of this important employment issue is necessary under title IX as well as under other laws. A seniority system that applies to all workers equally is a vital protection against a company's whims to lay off activist workers, older workers, or workers whom management arbitrarily dislikes.

The seniority system was the fruit of a hard-won battle by the labor movement in this country, and cannot be dismantled on a pretext which will in fact, consolidate arbitrary power in the hands of employers.

At the same time that bona fide seniority systems are protected, however, so must be the rights to equal job opportunity and the affirmative action measures which have been taken to foster them. At the UAW, we have faced the problem of layoffs running headlong into the job rights of people recently hired under affirmative action programs.

Our resolution of this problem is twofold, and is best illustrated by examples. Imagine a woman who applied for a job as a computer operator at a college in July 1972—after title IX's effective date—and was denied because of her sex. She did not get hired until July 1974, and as a result has now been caught in a layoff.

If she had been hired when she should have been, she would have 3 years instead of 1 year of seniority. While she is on layoff, then, the UAW proposes that she continue to be paid and receive all fringe benefits just as if she were not laid off.

We call this remedy "front pay" for continuing discrimination, as a corollary to the "back pay" one receives for past discrimination. This proposal places the burden of layoff on the employer who had practiced the discrimination, and not on the individual or her fellow employees.

The second prong of the UAW position is protection of seniority rights for employees whose employers are under affirmative action court orders or consent agreements. Thus, anyone who had not personally been discriminated against but who was hired as part of a legally mandated affirmative action plan would be protected from termination.

The method would protect the gains of affirmative action from being completely washed away. For example, many collective bargaining agreements apply a "time-for-time principle," so that a worker with 6 months seniority remains on the layoff recall list only for the length of the earned seniority, or 6 months.

Our proposal would keep a person who had been hired under a legally determined affirmative action obligation on the list of employees eligible for recall for as long as necessary. Nor would they have lost their earned seniority rights upon recall.

The UAW feels these are the only equitable methods for balancing the union's strong dual interests in maintaining bona fide seniority protection while preserving the precious recent gains of affirmative action for women and minorities.

As a labor organization, the UAW has considerable experience with grievance procedures provided by our contracts with employers. We are of course in favor of establishing effective procedures within an institution which encourage the parties to meet, discuss, and resolve their differences by themselves.

We feel an effective grievance procedure can oftentimes resolve a dispute without the necessity of seeking out a Federal agency or court. At the same time, however, no one can ask an aggrieved person to forego his or her legal rights.

We are concerned, therefore, about the fuzzy quality of HEW's proposed section 86.8. Of major concern to us is the failure to define the relationship between the grievance procedure provided for in a collective bargaining agreement and whatever procedures HEW contemplates. As the exclusive bargaining representative of the workers we represent, we feel the contractual grievance procedure should be the internal grievance procedure under title IX for those employees.

For those employees who are not working under a contract with a grievance procedure, and for students and applicants who are covered by title IX, we feel section 86.8 needs considerable clarification.

The UAW certainly favors exhaustion of internal remedies where the procedure is a meaningful one. But with the present wording, a noncontractual grievance procedure could easily be a farce. It could only result in exhausting the discriminatee, not the remedies.

We urge much greater clarification of this section. An effective grievance procedure must protect against "putting the fox in charge of the henhouse," and we have no such guarantees here. Specific guidelines defining "prompt" and "equitable" are needed. Moreover, the regulations must recognize the institutions' obligation to respect the nondiscriminatory grievance procedures in collective bargaining agreements which have been negotiated by unions on behalf of employees.

In general, HEW has afforded title IX the broad coverage which the statute requires. However, HEW has deviated from this in the important areas of professional and vocational programs admissions. The Secretary himself admits that "the statute pertaining to admissions might be read as including professional degrees wherever they are offered. Yet he interprets title IX to exclude coverage of admissions discrimination in private undergraduate vocational and professional schools.

The UAW asserts that the Secretary's position is erroneous statutory construction, and violates both the letter and the spirit of title IX. The UAW is particularly concerned about the inclusion of private undergraduate vocational and professional programs because many of these are feeder systems into the skilled trades from which women have been excluded in the past.

The definition of educational institution in part (c) of section 1681 of title IX provides that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

According to this definition, a vocational school that is part of a private undergraduate institution is covered by the act, which if receiving Federal financial assistance, cannot discriminate in admissions on the basis of sex. The proposed guidelines say in section 86.15 that each administratively separate unit shall be deemed to be an educational institution.

Thus it is clear that a vocational post-secondary school, with its own administration, within a private undergraduate institution must also be nondiscriminatory under title IX.

As a labor organization, the UAW has a particularly keen interest in the proper application of title IX to private undergraduate vocational education. Workers who are compelled to take night classes because of their daytime obligations often resort to evening vocational programs offered through private undergraduate schools.

Because such courses are often a key to a worker's advancement, they must be open to all regardless of sex if women are ever to achieve parity in a huge number of variety of occupations. The method the Secretary proposes for interpreting title IX's coverage virtually ensures continuing sex imbalance in fields such as drafting, accounting, computer technology, tool and die making, electrical technology, engineering, nursing, and a wide range of health science paraprofessional positions, to name only a few.

In the automotive industry, the private undergraduate General Motors Technical Institute serves as an example of an educational institution which could continue its overwhelming male majority with impunity under the Secretary's faulty interpretation of title IX's coverage. The Tech Institute is an avenue for a substantial number of talented workers to upgrade their positions; such opportunities should be available based on merit, not sex.

The UAW emphasizes this aspect of the proposed guidelines because of its own strong commitment to women's full participation in apprenticeship training programs. In its own Outreach Program, the Union's Manpower Training Department reports 205 women enrolled as of fall, 1974.

Presently, 120 women have passed the preapprenticeship training test, and another 35 are in apprenticeship programs. These women are in addition to the many others enrolled, with UAW encouragement, in various apprenticeship programs sponsored by organizations other than the Union.

The UAW strongly feels, therefore, that private undergraduate vocational programs should live up to the equal opportunity standards we have set for ourselves in the area of skilled job training. To fulfill both the clear language of title IX and its purpose of affording sex-neutral education, private undergraduate vocational admissions must be subject to the Act.

For unexplained and inexplicable reasons, HEW has redefined a "bona fide occupational qualification" except to equal employment opportunity. The EEOC definition, as set forth in its regulations on sex discrimination, should be adopted instead. Besides promoting uniformity within the government, acceptance of the EEOC definition would provide the true protection against sex discrimination which title IX mandates. We urge HEW to use the EEOC's bona fide occupational qualification definition, instead of the proposed section 86.61.

The Secretary has explicity stated in a proposed regulation that title IX neither bans use of certain material nor requires adoption of alternative curricular aids. The UAW disagrees with this omission, for the curriculum is a key shaper of students' values and aspirations.

The regulations are inconsistent, moreover. They properly rebuke use of sexist and/or sex-stereotyped materials in school counseling. Yet they allow such material into the classroom where it will have the pervasive effect of propagating sex stereotypes and providing sexist career models.

Nor do we see a conflict between banning sexist materials and protecting first amendment rights. We are not saying such material cannot be produced, but merely that the State should not align itself with prejudice by purchasing it. A fuller discussion of title IX's proper application to curricular materials was included in our comments to the Secretary last fall. We urge the Secretary to reconsider his position on this issue.

Having offered specific criticisms, we would like to call attention to certain provisions of the regulations which we feel HEW has drafted exceedingly well. Key provisions of title IX have been dealt with by HEW in a thorough and legally responsible manner. We especially cite the proposed regulations which treat pregnancy and related phenomena in the same manner as any other temporary disability. If pregnancy were allowed to differentiate employees and students, the regulations would pervert the act's intention to give rights to all women, not merely to nonpregnant women. Any attempt to weaken these portions of the regulations should be defeated. An important corollary is the ban on discrimination based on marital or parental status.

We also note with approval that HEW properly defined the congressional phrase "educational program or activity" almost as broadly as possible. Thus, we view the coverage of athletics, counseling, recruitment, scholarships, course offerings, and part-time employees as all necessary to effectuate title IX's purpose. We also endorse the definition of an educational institution subdivision for purposes of the funds cutoff remedy.

In addition, we feel the sections concerning provision of equivalent financial aid, insurance of extensive rights to equal employment opportunity, and an equal pay provision which is consistent with the Equal Pay Act, should all be retained by HEW.

On balance, then, the UAW urges Congress not to disapprove these proposed title IX regulations. While we have expressed dissatisfaction with several provisions, we feel that the majority of these regulations is sound. Moreover, the few objections which we have can be cured by subsequent amendments to the regulations.

As the collective bargaining representative of employees of educational institutions, we must insist that these employees get their rights under title IX. In the provisions of the regulations most important to us—the regulations governing employment—HEW has for the most part produced guidelines that are equitable, reasonable, and required by law.

We urge you to let these proposed regulations take effect on July 21. A vote against these regulations is a vote against the workers the UAW represents.

We ask Congress to carefully examine the sources of certain commentors who seek to sabotage title IX by defeating these regulations. We recognize the great pressures that are on you from the intercollegiate athletics lobby. We ask that you weigh the speculative costs to intercollegiate football against the interests of millions of workers and students who sit without effective rights until these regulations became law.

We have already waited 3 years, and can wait no longer.

Thank you very much.

Mr. SIMON. Thank you very much.

Our next witnesses are Ms. Casey Hughes, director, National Organization for Women, and Ms. Holly Knox, project director, Project on Equal Education Rights.

STATEMENT OF HOLLY KNOX, PROJECT DIRECTOR, PROJECT ON EQUAL EDUCATION RIGHTS, NATIONAL ORGANIZATION FOR WOMEN, LEGAL DEFENSE AND EDUCATION FUND

Ms. KNOX. Good afternoon. I appreciate your invitation to testify today. I'm Holly Knox, director of the Project on Equal Education Rights—PEER. PEER, a project of the NOW Legal Defense and Education Fund, is monitoring the enforcement of all Federal laws banning discrimination on the basis of sex in education.

Since our beginning in 1974 we have focused our attention on title IX of the Education Amendments of 1972.

Americans have always viewed education as a cornerstone of a sound and healthy Nation. However, the discrimination against women which runs through much of our society is deeply imbedded in the Nation's education practices.

For girls and women seeking equality in all aspects of Ameriacn life, it has become clear that education at all levels has been part of the problem, not part of the solution.

Five years ago this month this subcommittee opened extensive hearings on discrimination against women in education. Witness after witness detailed the discrimination faced by girls and women throughout the country, from preschool to the postgraduate level.

Among many examples of inequality, they pointed out that a young woman frequently needed higher marks to enter college and graduate school than a young man, and that an estimated 75 to 90 percent of the well-qualified students who do not go on to college were women.

Testimony detailed extensive biases against girls and women in vocational training, student financial aid, textbooks, counseling, and hiring—in short, in nearly all aspects of education.

Prompted by the extensive evidence of discrimination uncovered in these hearings, Congress enacted title IX of the Educational Amendments of 1972 to provide Federal leverage for insuring equal education opportunity throughout American education.

As you know, title IX, closely modeled after title VI of the Civil Rights Act of 1964, in an historic broad-based prohibition against discrimination on the basis of sex in education programs receiving Federal aid.

It is an essential piece of the growing network of civil rights laws guaranteeing equality for women, since it is the only comprehensive Federal law forbidding sex discrimination in nearly all aspects of education in schools and colleges receiving Federal aid—including admissions, employment and the treatment of students once admitted.

In that context, I'd like to take a minute to comment specifically on the scope of title IX's equal opportunity protection, since the subcommittee has heard representatives of male athletics programs argue that the scope of title IX is so narrow as to exclude school athletics programs. The basic question has been: Does title IX prohibit discrimination in the entire program of an institution receiving Federal aid or just in those activities directly receiving Federal funds?

Based on a legal analysis prepared for PEER by the Center for National Policy Review, we believe that the law bars sex bias in the entire education program. We would like to submit this memorandum for the record.

We would also like to submit for the record a copy of a legal memorandum prepared by the Library of Congress which also concludes that HEW is not mistaken in interpreting title IX broadly.

Section 901 of the statute is a broad prohibition against discrimination on the basis of sex "under any education program or activity rereceiving Federal financial assistance." The language of this section is nearly identical to the prohibition against discrimination based on race, color, and national origin in title VI of the Civil Rights Act of 1964.

Under the 1964 Civil Rights Act, both HEW and the courts have interpreted title VI as barring discrimination in all aspects of the educational program in a school district receiving Federal aid. That interpretation was well established at the time of title IX's enactment.

Therefore, since the language of title VI and title IX is so narly identical, it seems clear that title IX's ban against sex discrimination must be interpreted the same way—covering the whole education program carried out by education institutions receiving Federal funds.

Aside from the decade-long history of virtually identical language under title VI, there are several practical reasons why the scope of title IX's antidiscrimination prohibition must be interpreted broadly.

A narrow interpretation, that is, the law only forbids sex bias in the school lunch program or the tutoring program directly receiving Federal aid, would be impossible to administer. Tracking the Federal dollar precisely for civil rights purposes would lead to ludicrous situations.

For example, title II of the ESEA pays for school library books. Or title I of the ESEA pays for a projector.

Do you want to send in HEW investigators to trace exactly which classes used a title I projector? Or a title II library book? Do you want to bar sex discrimination in any classroom using that book or that projector, but condone it in the classroom next door which doesn't?

In addition, Federal aid to one school activity amounts to indirect financial assistance to other school activities. If Federal funds were not available for a given activity, in many cases nonfederal funds would have to be diverted from other educational purposes to support that activity. Thus, Federal vocational education funds, for example, may be indirectly subsidizing the school sports program.

Finally, the contention that Federal money does not support sports programs directly is nonsense. Particularly at the higher education level, millions of dollars in Federal student assistance funds are channeled into the general institutional operating funds most institutions use to finance athletics as well as all other aspects of the college program.

In sum, we believe that title IX, and the regulation implementing it, must be interpreted broadly for a number of powerful reasons. Legally, racial discrimination precedents under title VI require it. In practice, any other interpretation would be impossible to administer.

It would involve HEW investigators in the internal affairs of education institutions to a degree never before contemplated by the Federal Government.

Moreover, limiting the prohibition against sex discrimination to activities receiving direct Federal aid would put a congressional stamp of approval on all kinds of book-juggling designed to allow continued discrimination against half the school population.

A narrow, limited interpretation of the scope of title IX would reraise questions long settled over a decade of consideration by three branches of Government on civil rights legislation guaranteeing the rights of those subject to discrimination based on race, color, and national origin.

Last but not least, a narrow interpretation of title IX will not exempt intercollegiate athletics from the law's equal opportunity guarantees.

At the time of its passage in 1972, title IX was seen as a major step toward ending the inequities facing women and girls in education. Since the statute is broad, and since sex bias is so much a part of our traditional education system that many well-intentioned educators still don't fully recognize it, a regulation spelling out its implications for existing education practices is absolutely essential to making title IX's equal opportunity promise a reality.

Therefore, the title IX regulation has generated unprecedented interest and concern among many organizations and individual citizens.

In response to HEW's request for public comment on the proposed regulation published last June, PEER and the NOW Legal Defense and Education Fund filed a detailed critique. We were concerned that the regulation did not cover sex-biased textbooks used in the Nation's public school classrooms.

While HEW argued it should not regulate in this area because of "grave constitutional questions" under the first amendment, our legal research persuaded us that the first amendment need not inhibit Federal action under title IX, as long as the antibias provision covers textbooks already centrally selected by State and local public school authorities.

The NOW Legal Defense and Education Fund was also concerned that the regulation spell out concrete requirements to guarantee equal opportunity for women in school sports programs.

We also recommended more equitable procedures for the provision of fringe benefits and equal rights for complainants.

Looking at the title IX regulation now, we see several areas where it does not clearly provide full equal opportunity for women. While the regulation represents a crucial step in the right direction, we believe it does not go as far as it could in mandating an end to sex discrimination in federally supported education.

For instance, we do not think the time lag for compliance with the athletic provisions—1 year for elementary schools, 3 for those at the secondary and college level—is warranted.

Title IX was passed in 1972 and the regulation is expected to take effect this year. That means it would be 1978—6 years after the law was passed—before its athletics requirements would take full effect.

A young woman in junior high when title IX passed in 1972 could graduate from high school without benefiting from the law's athletics coverage.

We are also concerned that the regulation does not clearly guarantee equal sports opportunity, given the language on contact sports and the laundry list of factors which HEW may consider in determining equal opportunity in sports.

The regulation does not clearly require schools to provide girls the chance to play contact sports, and the "equal opportunity" section is so loose that it would be read to allow school districts and colleges to continue many existing inequities in their sports programs.

We are also worried about the deletion of the requirement for a survey to find out what sports female and male students want to play and the requirement that that institution must make a special effort to overcome the effects of past inequities in the athletic program.

We continue to question the adequacy of the regulation's provisions concerning fringe benefits, admissions to private professional schools, scholarships, and the rights of complaints.

Despite these questions, we do believe, that as a whole, the regulation spells out an appropriate framework for ending illegal sex discrimination in education. It provides essential guidance to institutions preparing to end sex bias in many important aspects of sex discrimination—many, such as vocational education, counseling, and admissions, which have received little or no press attention.

We particularly applaud the mandate that each institution conduct its own evaluation of its policies and practices within the next year to find out whether sex discrimination exists.

A great deal of discrimination against girls and women is unconscious, reflecting traditional attitudes and practices which have only recently been challenged.

The regulation's self-evaluation provision, in encouraging institutions to identify and correct discrimination of their own, should help to reduce the need for formal sanctions against noncomplying institutions.

I appreciate the opportunity to testify, and now I'd like to turn the microphone over to Casey Hughes from NOW.

STATEMENT OF CASEY HUGHES, DIRECTOR, LEGISLATIVE OFFICE, NATIONAL ORGANIZATION FOR WOMEN

Ms. HUGHES. Good afternoon. I am Casey Hughes, legislative director of the National Organization for Women. The National Organization for Women is a civil rights organization and it is from that perspective that we view the regulations for title IX.

Since Congress passed title IX in 1972, almost all aspects of sex discrimination in schools and colleges have been illegal. The enactment of this crucial new link in the Nation's civil rights laws was heralded by citizens throughout the country as the basic legal framework for ending the extensive educational inequities facing our daughters.

Title IX was, and is still, the only comprehensive Federal law protecting the equal educational rights of students throughout the educational system. Title IX's enactment 3 years ago did prompt some changes in an educational system where inequities exist in nearly every aspect of school life.

NOW has been on the forefront of action efforts to press local school districts and colleges to end these inequities. Thanks to title IX, we have seen limited progress in a number of campuses and communities—vocational schools opened to women students, women's sports programs expanded somewhat, and so on.

By and large, however, because of the absence of guidelines spelling out the law's implications and HEW's failure to enforce the law without regulations, changes to end sex discrimination in the last 3 years seem to be few and far between. Discrimination against girls and women in education still abounds.

Children are required by the State to be in a school setting 5 days a week, 9 months a year for about 10 years. Children of a certain age are not free to choose not to go to school. So long as children are required to be in a given school building for 10 years of their lives, they have a right to expect that they will be treated as equal human beings and not subjected to discriminatory treatement.

Persons who pay tax dollars which eventually find their way into the coffers of institutions of higher education as well as school systems have a right to expect that their Federal Government will not dispense their money in ways that will discriminate against the very people who gave the money or against their children * * * boys and girls, young men and young women.

We feel that the time is past to discuss the regulations point by point, chapter and verse. At this point the critical need is to release the regulations as they are to let educators of this country, in particular, and the citizens of the world, in general, know that the United States of America will no longer tolerate discrimination in educational institutions against half of its population.

Title IX was meant to institute change. There is no way to change without changing. We must get on with it. But perhaps that is too simple. And by its very simplicity looks radical. Perhaps what we need is to look at are the myths which becloud some people's perception.

Perhaps there are people who believe that all American girls are named Cinderella and that Prince Charming will be along as soon as she leaves school at whatever level to take care of this delicate, frail creature for the rest of her life. Perhaps there are those who believe that a young American girl does not need a strong body or a strong education to help make her an independent person, because the prince will be there to take care of her. Perhaps we need to compare that myth with the reality. The reality is:

Forty percent of the American labor force is made up of women.

Even if a woman marries she can expect to work for about 25 years. She will work for 45 years if she remains single.

Thirteen million women with school age children work outside the home.

Even with preschool children, 4.9 million women work outside the home.

One out of eight families are headed by women.

One out of five minority families are headed by women.

The divorce rate is up 109 percent since 1962 and rising.

In divided families, payment for child support by fathers is nearly nonexistant.

In the last 50 years, the longevity rate for women has increased by 20.6 years for women and only 13.8 years for men.

The majority of old people who are poor are women.

Which of the young women now in school is not going to be one of these statistics? Which one does not need the life preparation to make her able to take care of herself and her family?

Last fall, we submitted to HEW, with our title IX recommendations, extensive evidence of current sex discrimination in the Nation's schools supplied by scores of local NOW chapters. The examples cited are firsthand accounts of the abuse that is still occurring daily in schools and colleges that our daughters and sons attend. When will there be Federal enforcement to eliminate this discrimination? Not until title IX regulations exist and are enforced.

The U.S. Office of Education funded project baseline studied vocational education programs around the country. The final report of that project, published in the spring of 1975, says that young women, who represent the majority of the students in the vocational education programs, are in female intensive programs which limit their gainful employment opportunities to about 30 options while young men in male intensive programs are learning over 90 employment options. When is there going to be Federal enforcement of systematic integration of these programs? Not until title IX regulations exist and are enforced.

In Baton Rouge, La., girls are forced to take needlepoint in physical education classes on rainy days because the boys are using the gym. When is there going to be Federal enforcement of nondiscriminatory treatment in school? Not until title IX regulations exist and are enforced.

Discrimination against women employees also continues to be a serious problem throughout the educational system on all levels. According to a nationwide survey by the NEA, 62.8 percent of all the full-time professional employees of public schools during the 1972-73 school year were women. While over 80 percent of the elementary teachers during the same period were women, women represented less than 20 percent of all principals of elementary schools. On the secondary school level, less than 2 percent of the principals were women. At the top of the administrative heap in elementary and secondary public education are school superintendents, 99.9 percent of which were men. Only 65 out of over slightly more than 13,000 superintendents were women. Women are shut out of career advancements at the postsecondary level as well.

Sex is a more persistent and stronger factor in salary discrimination on the university level than is race, according to a recent study based on data from the 1974 Carnegie Commission report. According to the report, women faculty members average about $1,500 per year less than their male counterparts. When will women have equal employment opportunities in education? Not until title IX regulations exist and are enforced.

Members of NOW chapters in State after State—and we have over 700 chapters in all 50 States and the District of Columbia—have reported that educators and administrators of everything from elementary schools to institutions of higher education have said they will move on a large scale only after the regulations are promulgated and HEW enforces the 3-year-old law.

Textbooks used in classrooms throughout the country are also rife with sex bias. Numerous and extensive studies over the past few years have all arrived at the same conclusions: That textbooks portray girls and women as weak, helpless, and inferior to boys and men. Many show girls as stupid and unable to excel at their studies, while adult women are portrayed almost solely in one occupational role—that of housewife—cooking and cleaning. NOW is disappointed that the regulations do not cover this vital aspect of education. We would like to see textbooks teach children to value themselves and those who are different from them, rather than serve to reinforce prejudices and myths about boys and girls.

Some people have expressed the opinion that athletics have been overemphasized in regard to title IX, and that it is not as important as other aspects of the regulations. We disagree. Athletics are important not because every young woman must be a super athlete, anymore than every young man must be a super athlete. Americans have long held that athletics are important for boys because they develop qualities of teamwork and leadership. Which of these qualities is not important for young women to learn? And it is even more important that boys and girls learn to cooperate on teams together and learn to accept leadership from each other if they are ever going to be able to work together in adult professional and occupational roles. Athletics are important to some young women because athletics will be their road to education and to a successful life—a way of moving up in the world. A road that has been opened for many young men. We would like to respond to the testimony given by some coaches and the NCAA, who are saying that the regulations will mean an end to college football and other revenue producing sports.

First, it's not true that these sports usually bring in extra revenue. According to NCAA's own figures, fewer than one-fifth of its own members clear more than expenses in one sport. NCAA estimates the annual sports deficits of its own members at $500 million. NCAA only represents some 700 institutions with the more extensive sports programs. Some 2,000 other institutions aren't members of the association and are even less likely to make money on their programs. More and more institutions are cutting or dropping expensive football programs as too large a drain on the institution's resources.

Second, even when they do bring in revenue, the funds may not be going to women's sports. Darrell Royal, coach of one of the Nation's most successful and lucrative big time football programs—at the University of Texas—testified last week that his football revenues support the rest of the men's athletics program—but none of it goes to women's sports.

Third, the regulation will not destroy football and basketball revenues. It virtually exempts contact sports—including football and basketball. It does not require equal expenditures, and the equal opportunity provisions are so loose that they could leave room for considerable inequities between athletic programs for men and women.

Those who argue that title IX will destroy revenues sometimes appear to be talking out of both sides of their mouths. For example, University of Maryland athletic director, James Kehoe was quoted June 5 in the Washington Post as saying title IX will "destroy established activities" by cutting into revenue-producing sports. When it comes to a conflict with his own basketball coach, though, Kehoe takes a different tack.

Quoted a week later in an article about his effort to cut back on the budget for Maryland's highly touted basketball team, Kehoe said, "The argument that basketball and football bring in a lot of money isn't valid any more. I have to think about the financing of 21 sports, not just two."

Fourth, we question the assumption that bringing women into sports will lower revenues. This is another case of telling women that their labors have no monetary value. Please rember that Billy Jean King was in the forefront making of tennis a popular and revenue-producing sport. More women than you can imagine are avid sports fans.

What we want now is an opportunity to move from spectator to participant and to have the opportunity to cheer for members of our own sex. Finally, it is quite possible for a person to be a devoted football fan and also in favor of title IX—I present myself as a prime example. Congress is not in the bind of voting against women or against football, for they are not mutually exclusive.

In conclusion, there is extensive evidence that despite the enactment of title IX 3 years ago, illegal sex discrimination is still common at all levels of education. In large part, HEW's failure to issue a final regulation must be held responsible.

Schools and colleges already know that they must end discrimination against women. They need a regulation now to give them guidance in doing so. Young girls and women in schools and colleges across the country are struggling against the effects of discrimination. They need a regulation now to provide them relief and enable them to participate in and benefit fully from education.

HEW has not, up to now, enforced title IX to any extent, giving as an excuse for its inaction the lack of a regulation. Without the regulation the Office of Education won't even ask applicants for grants and contracts for an assurance of compliance with title IX. The regulation is needed now so that title IX, passed in 1972, may at last be enforced.

We must have a regulation now. The time has come for the Government to back up the promise of title IX.

Congress people, it seems to us, can either vote their belief that American girls and women are citizens of this country with equal rights and due protection who can decide individually what they want to do with their lives or the Congress people can vote that American girls and women are second class citizens whose education can be based on discriminatory practices which are supported in whole or in part by Federal funds.

It is as simple as that. You are the gatekeepers of educational bondage. Will you lift the latch and let the title IX regulations pass or will you keep them, and with them all American girls and women, in an educational ghetto.

We of the National Organization for Women urge you: Let my sisters go.

Thank you.

Mr. SIMON. Thank you very much. We appreciate your testimony. Mr. Andrews, do you have any questions?

Mr. ANDREWS. I have no questions.

Mr. SIMON. Mr. Buchanan?

Mr. BUCHANAN. Thank you, Mr. Chairman.

Ladies, I think that you have given very impressive testimony. You have complimented and praised the self-evaluation aspect of title IX regulations. We have had questions raised about both the self-evaluation and the grievance procedure requirements as to whether or not they were envisioned or permitted, or mandated, by the law, and were a proper part of the HEW regulations. I wonder if you would comment on that.

Ms. KNOX. I cannot imagine why they would not be considered as being a part of the HEW regulations. They are simply administrative procedures to help HEW enforce the law. Certainly, it is proper, within the scope of the law, for an institution to look at its own practices to find out whether they are discriminatory or not. Otherwise, how are you going to eliminate illegal discrimination?

Mr. BUCHANAN. What about the grievance procedures?

Ms. KNOX. I have no particular opinion on that. Again, I see no reason why HEW could not, as an administrative convenience, require institutions to establish grievance procedures. It does not require grievants to take advantage of those grievance procedures, but it simply requires them to be made available, if people feel that they need them, if they find them useful.

Mr. BUCHANAN. Title VII on the Civil Rights Act governs sex discrimination in employment. Do you feel that in light of the protection in title VII that there is also a need for civil rights action in addition to the EEOC protection?

Ms. KNOX. I do, especially considering the EEOC's enormous backlog. The EEOC is thousands of cases behind. Also title IX provides an administrative remedy which title VII does not. Sometimes the administrative remedy is the best way to achieve a solution quickly.

Sometimes the court resolution which title VII provides is more appropriate. It is a question of what is the best way to get one's rights.

Mr. BUCHANAN. You mentioned in your testimony the problem that so much of the press attention has centered around the athletic aspect. I know, and as you have made clear, that this is an important part of the whole picture in the scale of things.

I have some concern that the very politically, potentially powerful lobby is aroused or can be aroused over the athletic aspects, which is a rather small part of the overall coverage of an area which I think is rather major social problems, which this country has and which is not taken nearly seriously enough, that is sex discrimination in education and employment. I wonder if you would comment in response.

Ms. **Hughes**. We address ourselves to the athletic issue, I think, because it is very emotional. I don't think that our emotional attachments to athletics have been made clear enough. We wanted you to be aware that we feel that it is important, although certainly not the most important.

I might add that a very powerful lobby has been coming about in favor of the regulations for women in athletics. I hope that you realize that we are certainly larger in number.

Mr. **Buchanan**. If you get enough of the women with you, I would completely agree with that analysis of the situation.

Ms. **Knox**. We even have some men with us.

Mr. **Buchanan**. One of the things, I think, that we should realize is that there are not enough women concerned about the rights of women in this country.

Ms. **Hughes**. I think that you may be mistaken.

Mr. **Buchanan**. Let us hope so.

Thank you, Mr. Chairman.

Mr. **Simon**. Mr. Blouin.

Mr. **Blouin**. I have a few questions, Mr. Chairman.

Perhaps I could serve my questions to both of you, and whoever is the best equipped, jump in.

There are some who have suggested that title IX ought not to be interpreted as broadly as title VI. I know your group completely disagrees with that. Is there some reason title IX should be interpreted in a narrow scope?

Ms. **Knox**. I think that it would raise questions about the well-established principle about the scope of title VI discrimination on the basis of race and national origin, and that is one of our concerns, too.

Mr. **Blouin**. As you probably know, there are some Members of Congress who do not believe that the institutions should have to go through any kind of self-evaluation process. Do you think that there is some benefits that could accrue to the institutions by going through the self-evaluation process?

Ms. **Hughes**. We call that consciousness raising.

Ms. **Knox**. I think that it is very much to the advantage of the institutions. Usually, institutions respond to Federal pressure with "look, you don't need to pressure us, we can do it ourselves." HEW is asking them to do it themselves.

The alternative is for the institution, basically, to do nothing. If it is not required to investigate its own practices, it may not realize that it is discriminating. It may take no action. In that case, it is a sitting duck for HEW investigators, and begin to institute final termination proceedings. No institution wants to be in that position. I would think that they would look forward to the opportunity to, in effect, do it themselves before HEW has to come in breathing down their necks.

Mr. **Blouin**. You view this as a verbalization of what many institutions say they can do in relation to self-analysis.

Ms. Knox. Some have, and most have not.

Mr. Blouin. What do you think the impact would be if, for some reason, any part or all of these regulations were disapproved? If, for some reason, we should decide, for instance on the issue of athletics, with the NCAA, or on the side of the other groups?

Ms. Hughes. There would be complete outrage not only of our members, but of the many who are working in coalition with us. They are looking very closely, and they will interpret the subtraction of their rights as a statement against women. I think that it would be complete outrage, that is the only word that I can think of to describe it.

Mr. Simon. If the gentleman would yield at that point.

I am concerned less with the outrage than the practical impact on various educational levels. What would be the practical impact?

A gentleman told me that the court decisions are going your way, anyway, so there would not be any need for HEW regulations. If we turn down HEW regulations, does this, in fact, slow the progress?

Ms. Knox. Assuring equal rights through the courts is a slow, messy, tortuous process. Different courts in different areas make different decisions. It is not until years later, if and when you can get the case before the Supreme Court, that we have a national policy.

In the meantime, my rights, which the courts in my area have determinde that I have, may not be someone else's rights in another part of the country. The reason for enacting title IX or title VI, or any of the civil rights laws, is precisely to protect individuals from having to go through along the long, tortuous process of taking every single case through the courts.

If the regulations were disapproved, educational institutions, I am certain, would read as Congress inability to back up its 3-year-old commitment to equal opportunity for women. It would be read that way no matter what the reason for disapproval, no matter on what narrow grounds the regulations were disapproved, it would be seen as a congressional rejection of title IX, and the educational institutions would respond accordingly.

It is difficult for them to change. In many cases, it means spending some money. Institutions do not like to change until they know that they have to. Any signal from Congress that they do not have to change will make it that much longer a road toward equality.

Mr. Blouin. You think that it is fair to assume, and I assume this from what you said, that any kind of disapproval of any part of the regulations will retard the civil rights movement for women, even with all the court cases going on in the way of equality. It will have a retarding effect on the progress that has been made.

Ms. Hughes. Absolutely.

Ms. Knox. There has been some progress since title IX was passed. It is limited in the absence of the regulations, but there has been some movement on the expectation that HEW would be promulgating the regulations. If there is any signal that there would be no enforcement to accompany the rejection of the regulations, that will retard the movement.

Mr. Blouin. I appreciate your comments.

One final point. I would like to commend you for mentioning specifically the revenue loss comment of the NCAA, which is the thing that lit my fuse more than any other comment. Even if there was, indeed, a loss of revenue that would necessarily, in view of the statement by the chairman of the NCAA, affect the quality of the athletics, they very directly tie revenue producing to quality and to male. Apparently there is some strong rope that ties them together. I am glad that you responded to that. Thank you.

Mr. SIMON. Mr. Hall?

Mr. HALL. I am just looking on page 4 to the statement that in Baton Rouge the girls were forced to do needlepoint. I wonder if the boys yelled discrimination.

Ms. HUGHES. They certainly would have a good case.

Mr. HALL. I am reminded of my own teaching career, which included coaching. I can remember when we had to bargain with boards of education. For example, you mention that there is a $1,500 difference in the salaries of males and females. I can remember that the males, especially the married males, used to get very aggravated because the females were willing to teach for $1,500 less, they were married and working on a second job.

I also remember, especially in Illinois, that the boys were discriminated against, also, in some of the athletic programs. I wonder if we are not rapidly arriving at the point where we may have to do away with competitive athletics and concentrate on physical fitness, and developing sports that both boys and girls can take into their adult life. This is one of my concerns.

Mr. SIMON. Thank you very much. We appreciate your being here.

Our next witness is our distinguished colleague from Utah, who will introduce Dr. Dallin H. Oaks, Congressman McKay.

STATEMENT OF HON. GUNN McKAY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Mr. McKAY. I am pleased to be here to introduce a very distinguished citizen of my State, Dr. Dallin H. Oaks, president of Brigham Young University, and for the past 4 years, director and secretary of the American Association of Presidents of Independent Colleges and Universities. He is accompanied by his counsel.

Mr. Chairman, to give you a little background on Dr. Oaks. He did not stay in Utah, but had some experiences beyond. He grew up there under very humble circumstances, and then he took flight.

He served as executive director of the American Bar Foundation from 1970 to 1971, and was a member of the faculty of the University of Chicago Law School. In 1962, he served in the capacity of associate dean and acting dean of that school.

In addition, Dr. Oaks was counsel to the Bill of Rights Commission at the Illinois State Constitutional Convention in 1970, which you may have some familiarity with yourself.

Also, he began his law career, after his graduation from law school, as a law clerk to Chief Justice Earl Warren. So he has considerable background in the law.

I think the charge of the committee is to seek testimony about the legal aspects of title IX as it may affect the institutions, and President Oaks will address himself to that directly.

I appreciate the opportunity to introduce him. I am very pleased to be associated with a man of his character and his ability.

STATEMENT OF DR. DALLIN H. OAKS, PRESIDENT, BRIGHAM YOUNG UNIVERSITY, AND DIRECTOR AND SECRETARY OF THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES

Dr. Oaks. Thank you very much. I am grateful to Congressman McKay, my esteemed friend and my Congressman, for introducing me to the subcommittee.

I have a written statement, Mr. Chairman, that will be submitted for the record, and I will speak extemporaneously on the same subject, reserving some time for any questions that the subcommittee may wish to address.

I am here in the capacity of president of Brigham Young University, which is the largest private university in the Nation, and also as secretary and director of the American Association of Presidents of Independent Colleges and Universities.

First, let me say a word about that organization. We have over 100 members. They represent institutions of higher education in 33 States and territories. Some of these universities are large, like Brigham Young, Pepperdine, and Roosevelt, but most of them have enrollments of less than 2,500 students.

Some of those organizations are church related, representing such denominations as Baptist, Christian Science, Catholic, Methodist, Jewish, Nazarene, and Mormon.

The institutions in our association have a different relationship to Federal financial assistance. We are all concerned with the question of the independence of higher education.

On pages 10 and 11 of my statement, I submit a report of a survey that we took among the members of our association on the amount of Federal assistance that they were now receiving, a matter relevant to my testimony.

Of the 67 who had replied at the time that I prepared this statement, 20 received no direct or indirect Federal financial assistance of any kind, except that in most instances they admitted students who were on the GI bill or received Federal or State scholarships or loans. Twenty received Federal financial assistance amounting to less than 2 percent of their total budgets, and the remaining one-third of those who responded received Federal financial assistance in excess of 2 percent of their budgets, or small amounts of aid that could not readily be related to the percentage of their total budgets.

I appear here as a spokesman for independent higher education, to plead for private education as a competitive alternative to public education; and to perform its unique function, private higher education must be free from unnecessary and detailed government regulations.

We view with alarm the title IX regulations, seeing them as a dangerous and illegal quantum of the extention of Federal control over higher education. They are of greatest concern to private colleges and universities such as the members of AAPICU because they would impose a straitjacket that would deprive private education of the diversity and flexibility that it must enjoy to make a successful contribution to American higher education.

We see these regulations imposing pervasive new controls on the conduct of the educational enterprise in admissions, recruitments, student qualifications, access to educational programs, conduct of educational programs, housing on and off campus, other financial assistance to students, and employment, health and insurance benefits, athletics, employment and placement of graduates.

Now, members of the subcommittee, we have no issue with the goal of equal opportunity. Our issue is with the pervasive, intricate, and unjustified regulatory mechanism proposed to implement that goal.

This committee has requested that we speak on the legality of the regulations, and so I will confine my testimony to that subject, which will, perhaps, be in contrast to some of the testimony the committee has received.

The first point I wish to make is that the regulations are unconstitutional in their direct, inhibiting influence on academic and religious freedom of institutions.

The second point is that the regulations exceed the legal authority of the Secretary of Health, Education, and Welfare, and are, in fact, inconsistent with the express provision of the congressional legislation, and the clear intent of that legislation.

In short, we protest the administrative lawmaking. The Department should be confined within the limits of the legislative authority, and the Congress should be confined within the limits of the Constitution.

Both of those limits are offended in some respects by the regulations tendered here in their application to private higher educational institutions, particularly those religiously affiliated institutions.

First, the regulations exceed the legal authority set down in the acts of Congress. At the top of page 4 of my statement, I have quoted the basic 37 words of the legislation:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The Department has taken the position that the words "subject to regulatory control" applies to all programs or activities in an institution, any part of which receives Federal financial assistance. That is not the language of the statute.

The case law on this point supports the position that I have described. I refer here particularly to two cases discussed on pages 4 and 5 of my written testimony. I refer particularly to a quotation from the *Finch* case, whose holding was that the Department of Health, Education, and Welfare had no authority to terminate all Federal financial assistance from a school district that was admittedly engaging in racial discrimination because some portion of the activities of that district might be operated in a proper manner.

I read from that quotation at the top of page 6:

> The legislative history—in this case of Title VI which has substantial identical language—indicates a Congressional purpose to avoid a punitive as opposed to a therapeutic application of the termination power. The procedural limitations placed on the exercise of such power were designed to insure that termination could be pinpoint(ed) * * * to the situation where the discriminatory practices prevail.

I call to your attention that this does not say that the entire institution should be affected.

Continuing the quote:

> It is important to note that the purpose of limiting the termination power to "activities which are actually discriminatory or segregated" was not for the pro-

> tection of the * * * entity whose funds might be cut off, but for the protection of innocent beneficiaries of programs not tainted by discriminatory practices.

I refer you to the remarks of Yale University president, Kingman Brewster, which I have quoted in a portion of my statement. This distinguished educator, whose record in standing up for equal opportunity in racial and sexual matters requires no explanation to the committee, said:

> I do object to the notion that the receipt of a Federal dollar for some purposes subjects the private institution to Federal regulation and surveillance in all its activities.

Skipping some portion of the quote:

> These strengths [referring to freedom and flexibility] would be lost if, as a condition of receiving a Federal dollar for some purposes, we were to be subject to Federal regulation for all purposes.

I will now go to my second point—that the regulations violate our academic freedom. Private education is protected by the Constitution of the United States. The authorities on that are well known to the committee, and I will not rehearse them at length; however, I do have some quotations on pages 7 and 8 of my written statement.

The right of the private university to survive and to manage its own affairs is, therefore, a part of the liberty protected from Government invasion by the due process clause of the 5th and 14th amendments. That protection must allow the freedom to be different, and not be confined within the limits that Members of Congress choose to place on institutions which are publicly and tax supported.

In approving this administrative action in pursuit of laudable goals, members of the committee, you will allow the smothering of the freedom and the uniqueness of the private education in a welter of Federal regulations and reports. That was not intended by the Congress.

On the succeeding pages of my statement, pages 9 and 10, I quote three different examples of expressed congressional enactments, which illustrate that Congress contemplated that there was a difference between segregation by sex and segregation by race.

Congress has put sex on a different footing, and much of what you have been told about civil rights in general about racial segregation does not apply in this situation. It is clear from the expressed distinctions made in the legislation itself. There is a very good reason for sex to be placed on a different footing.

I also call your attention here to the fact that these regulations violate the freedom of religion in important respects, which explain the difference between segregation by sex and segregation by race.

For example, the question of the proper roles of the sexes in society and questions of sexual morality, pregnancy, parenthood, and abortion are all matters of religious and ethical significance.

Many institutions directed by members of our association are sponsored by or affiliated with religious groups, and many others are vitally concerned with ethical and moral values. The first amendment protects religious brief and advocacy from Government interference.

The title IX regulations touch directly on religious questions. For example, they provide that institutions must be blind to the occurrence of abortion. That hiring, admissions and classroom policies must not take notice of the fact that a person may have had or procurred an abortion.

Many religious organizations believe abortion to be immoral and akin to murder. The Constitution guarantees freedom for the advocacy of this widely held opinion and for religious affiliated or ethically committed institutions to refuse to admit to their association those who reject it.

In an apparent effort to avoid this problem, the regulations have posed an even greater threat to the fundamental guarantee of religious freedom. While purporting to exempt institutions operated by religious groups, section 86.12 actually requires such groups to prove to the satisfaction of a government administrator that their "religious tenets" are inconsistent with the requirements of the regulations.

Thus, a government agency reserves the right to judge the content and application of a religious tenet, and presumably to deny an institution's assertion that its religious belief compels a certain action or teaching.

By this means, Government and not the church becomes the final arbiter of religious worship, practice, and belief. The first amendment forbids this. Freedom to advocate and practice religious principles, like the other aspects of academc freedom mentioned above, must be protected from the encroachment of bureaucratic regulation.

In concluding my testimony, I appeal to the members of this subcommittee to do all in their power to arrest the encroachment of Federal control on the education institutions which have contributed so much to our country's greatness. As direct and indirect Federal tax support becomes a more and more significant factor in higher education, Congress should be increasingly sensitive to the danger that well-meaning Government administrators will use such assistance as a means of compelling uniformity in all of higher education.

The issue, I submit, is not the justifiabilty of the uniformity, or the requirement that is imposed, but it is the question of someone imposing upon educational institutions the obligation to be uniform, when they should, in order to perform their proper function, be diverse.

The genius of the American system has been its willingness to accommodate individuals and institutions with diverse opinons and to permit the pursuit of truth along diverse paths. Often the most despised idea has proven of the greatest benefit in the long run.

So long as our socity tolerates diversity, such benefits are possible. As we begin to inhibit opinions, actions, methods of teaching and academic values not currently in fashion in Washington, innovation and progress will diminish.

Thank you.

[Prepared statement of Dr. Oaks follows:]

PREPARED STATEMENT OF DALLIN H. OAKS, PRESIDENT OF BRIGHAM YOUNG UNIVERSITY AND A DIRECTOR AND SECRETARY OF THE AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES

Mr. Chairman and distinguished members of the subcommittee, the American Association of Presidents of Independent Colleges and Universities, of which I am an officer and director, is pleased to have this opportunity to present its views concerning the legality and propriety of the Regulations promulgated by the Department of Health, Education, and Welfare under Title IX of the Education Amendments of 1972. I also speak in my capacity as President of Brigham Young University, which has the largest fulltime enrollment of any private university in the United States.

Our Association, which was organized in 1968, is composed of the presidents of more than one hundred private colleges and universities located throughout the United States. Its purpose is to promote the interests of independent colleges and universities. We are determined that private higher education remain private and independent.

While our Association includes the presidents of large universities such as Roosevelt, Pepperdine and Brigham Young, most of our member presidents lead small private colleges having an enrollment of less than 25,000 students. (A list of our members is attached.) The preservation of such small colleges was one of the purposes of the Higher Education Amendments of 1972. It is therefore ironic that the Regulations issued under Title IX of those Amendments threaten the independence of private colleges. If private colleges lose their independence, they will have lost the capacity for uniqueness that makes their survival a matter of national concern.

I appear before this Subcommittee to express our members' alarm at the Title IX Regulations. These regulations represent a dangerous and illegal quantum jump in the extent of federal control over higher education. They are of greatest concern to private colleges and universities since they would impose a straightjacket that would deprive private education of the diversity and flexibility it must enjoy in order to make its distinctive contribution to American higher education.

Title IX Regulations impose pervasive new controls on the conduct of the educational enterprise in all of the following areas:

Admissions and recruitment.
Student qualifications.
Access to educational programs and activities.
Conduct of educational programs and activities.
Housing, both on and off campus.
All other facilities.
Student financial assistance and employment.
Student health and insurance benefits.
Athletics.
Employment.
Placement of graduates.

We believe that all friends of independent higher education should be alarmed at the fact that the federal government proposes to issue this comprehensive set of rules directing how the educational enterprise will be conducted and imposing extensive government reports and supervision.

Our position should not be interpreted as an expression of opposition to the goal of equal opportunity for all persons without regard to race, religion, or sex. The members of our association support this goal without reservation. We are therefore in harmony with Title IX's expression of the fundamental American principle of equal opportunity for all. What we reject is the pervasive, intricate, and unjustified regulatory mechanism proposed to implement it.

The Regulations promulgated by the Department of Health, Education and Welfare under Title IX are legally defective in at least three ways:

(1) The Regulations exceed the legal authority given the Secretary or Department of Health, Education and Welfare.

(2) The Regulations tend to deprive persons in higher education of their fundamental rights of free speech, thought and association.

(3) The Regulations impose unproven social theories on educational institutions, endangering the diversity of thought and action that has been the strength of American higher education.

I. *The regulations exceed the legal authority given the Secretary or Department of Health, Education and Welfare*

Since we have been asked to limit our comments to the legality of the Regulations, I will focus primarily on this area. Title IX's proscription of discrimination on the basis of sex reads in pertinent part as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity receiving federal financial assistance* . . . . (20 U.S.C. Section 1681) (Emphasis supplied)

On its face, this provision seems to restrict regulation to individual educational programs or activities actually receiving federal funds. The Department of Health, Education and Welfare, however, has not limited the application of these regulations to individual programs or activities. The Department has interpreted this clause to give it authority to prescribe policies for every one of an institution's programs and activities. The Regulations seem to provide that if an educational institution has received, even indirectly, a single dollar of federal money, every decision, activity, facility, educational policy or communication of that institution is subject to review and regulation by the Department.

Sections 86.2 (g) and (h) of the Regulations provide that an institution is a "recipient" of "federal financial assistance" even if its receipt of federal assistance is only indirect or minimal. For example, they would apparently make an institution subject to control if it enrolled only one student receiving veteran's benefits or attending school under a federal grant or loan. In addition, the underlying premise of the Regulations—evident throughout—is that being a "recipient" subjects every institutional program or activity to regulation whether or not that particular program or activity receives federal financial assistance. The Department has therefore taken the position that if a college or university receives some direct or indirect federal financial assistance for its department of chemistry it must accept government supervision of all of its other academic departments, its dormitories, its admissions and financial aids policies, and every other aspect of its operations.

What is the Department's justification for disregarding the clear mandate of the statute that the sex discrimination regulations be confined to the "education program or activity receiving federal financial assistance?" In its comments to the Regulations at 40 Fed. Register 108, p. 24128 (June 4, 1975) the Department draws an analogy to *Brenden* v. *Independent School District* 742, 477 Fed. 2d 1292 (8th cir. 1973). But that case construed the broad sweep of the Constitution, not a statute specifically limited on its face.

In the *Brenden* case the court was asked to determine whether the equal protection clause of the Constitution applied to a public high school athletic program. Under well-established rules of constitutional construction, the court had to find some "state action" on which to base its jurisdiction. Purely private acts of discrimination are excluded from the reach of the constitutional prohibition. The court found that the athletic program in question had been created by state statute and that its rules were binding on high schools owned and operated by the state, thus clearly involving state action. There was no discussion whatsoever on the question of whether state funding of some other school activity would subject athletics to controls from which it would otherwise be free. Thus, the *Brenden* case does not support the proposition for which it is offered. In *Brenden* the court was considering a state-conducted activity. The Title IX Regulations purport to govern all activities, whether or not government operation or support is involved.

The intended reach of Title IX is clearly indicated by Section 902 of the Education Amendments [(20 U.S.C. 1682 (1972))], which states that violations of Title IX may be punished by terminating federal financial assistance, which ". . . shall be limited in its effect *to the particular education program or activity* or part thereof in which noncompliance has been found." (Emphasis supplied.) Clearly, the statute limits its reach to discrimination in the actual programs or activities receiving federal assistance.

It is inconceivable that Congress intended to punish colleges for discrimination in some academic or housing area by cutting off financial assistance going directly to veterans or other students. Yet this is precisely the proposition advanced by HEW. In support of this proposition, the secretary cites *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 Fed. 2d 1068 (5th Cir. 1969). The case does not stand for the proposition for which it is cited, although it does contain a dictum that if discrimination becomes so pervasive that it taints every aspect of a school district's program the Secretary might be justified in terminating all federal aid. The holding of the case, however, involved a school district's appeal from a decision of the Secretary of HEW terminating all federal aid under Title VI of the Civil Rights Act, which contains language substantially identical to that of Title IX in restricting termination to programs in which discrimination occurs.

The court held that the Secretary was not authorized to cut off funds from programs not involving discrimination. In explaining its holding the court said:

> "The legislative history of [Title VI] indicates a Congressional purpose to avoid a punitive as opposed to a therapeutic application of the termination power. The procedural limitations placed on the exercise of such power were designed to insure that termination could be pinpoint(ed) * * * to the situation where discriminatory practices prevail.
>
> "It is important to note that the purpose of limiting the termination power to "activities which are actually discriminatory or segregated" was not for

> the protection of the . . . entity whose funds might be cut off, but for the protection of innocent beneficiaries of programs not tainted by discriminatory practices." (At page 1075.)

The court held that H.E.W. had erred in cutting off all federal aid to the district's schools, even though all the district's high schools and elementary schools had been operated in a discriminatory manner. There may have been other programs, such as adult education, operated in accordance with Title IX, and federal aid to these should have been continued.

The Title IX Regulations actually ignore the holding of the *Finch* case, and, relying on a dictum that does apply, provide that even minimal federal assistance to one program or activity makes every institutional program or activity subject to regulation. A single act of discrimination, even in a program unassisted by federal funds, would be punished by total cessation of federal assistance. The Regulations as now drawn exceed the legal authority of the secretary and must be modified to limit their application to programs or activities directly assisted with federal funds.

An address by Yale University President, Kingman Brewster, to the Fellows of the American Bar Foundation (inserted in the Congressional Record by Senator Claiborne Pell) well expresses our fears and the fears of thousands of others in higher education concerning government domination of the educational process.

> "My fear is that there is a growing tendency for the central government to use the spending power to prescribe educational policies.
>
> "Use of the leverage of the government dollar to accomplish objectives which have nothing to do with the purposes for which the dollar is given has become dangerously fashionable.
>
> "As one who presided over the admission of women to a college which had been 'For men only' for two hundred and sixty-seven years, and as one who also presided over a strenuous effort to recruit qualified minority students, I think I can be assumed not to be opposed to women's rights and equal educational and academic career opportunity for minorities and women. However, I do *object to the notion that the receipt of a federal dollar for some purposes subjects a private institution to federal regulation and surveillance in all its activities.* This is constitutionally objectionable, even in the name of a good cause such as 'affirmative action.'
>
> "The essence of Constitutional restraint, I was taught, is that the worthiness of the end should not justify objectionable means.
>
> "Institutional diversity, autonomous trusteeship and faculty self-determination are the essence of the envied vitality of American higher education and its responsiveness to new fields of knowledge. *These strengths would be lost if, as a condition of receiving a federal dollar for some purposes, we were to be subject to federal regulations for all purposes.*" (Emphasis supplied.) *Congressional Record*, March 10, 1975, p. S3575.

Congress has very properly provided that federal funds shall not be spent to support programs involving illegal discrimination. But it is a giant leap from this logical and appropriate provision to a requirement that receipt of federal funds for any purpose, program or activity subjects institutions or citizens to across-the-board control by agencies of the federal government. When we adopt this idea as an instrument of government policy, we will have sacrificed vital indicia of personal and institutional freedom. Private higher education will no longer be private, and all colleges and universities will be required to march in lockstep to the distant drumming of a few administrators and pressure groups in Washington.

II. *The Regulations restrict the academic freedom of institutions and teachers*

The preservation of the freedom of colleges and universities is essential to the preservation of freedom in America. As the Supreme Court has said in *Shelton v. Tucker*, 364 U.S. 479, 487 (1968):

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the States to interfere with freedon of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Unwarranted inhibition upon the free spirit of teachers

> . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.' *Wieman v. Updegraff*, 344 U.S. 183, 195 (concuring opinion). 'Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate. . . .' *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250."

Freedom of individual teachers can be preserved only in institutions that are free. We must, therefore, guard this freedom of the individual by protecting the freedom of the institution.

Because academic freedom is so essential, the State may not compel students to attend public schools by prohibiting or suppressing private schools and colleges. In *Pierce v. Society of Sisters*, 268 U.S 510, 534 (1925), the Supreme Court said:

> "The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; they who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The state may not impose curricula upon the private school by, for example, prohibiting the teaching of a particular subject. *Meyer v. Nebraska*, 262 U.S 390 (1923).

The right of the private university to survive and to manage its own affairs is, therefore, a part of the liberty protected from government invasion by the due process clause of the Fifth and Fourteenth Amendments. Furthermore, as the preceding cases make clear, this academic freedom is also protected from governmental infringement because it is the foundation of First Amendment rights. Therefore, any regulation which restricts that freedom is invalid unless it meets certain stringent criteria.

> First, the governmental action must bear a reasonable relationship to the effectuation of some legitimate and substantial governmental interest.
>
> Second, although the governmental interest is legitimate, there must be an intimate and obvious relation between that interest and the conduct required by the governmental action.
>
> Finally, the government must establish that the regulation which infringes upon academic freedom, is not overly broad but is the least restrictive means available to accomplish the governmental purpose.

See *Kusper v. Pontikes*, 414 U.S 51, 58–59 (1973); *Gibson v. Florida Legislation Investigation Commission*, 372 U.S. 539, 546 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Lewis* v. *Buxley*, 368 F. Supp. 768 (D. Ala. 1973).

In recognition of these fundamental principles, Congress has frequently and expressly rejected the imposition of federal direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution.

20 U.S.C. Section 1232(a) (1974) provides:

> "*Prohibition against federal control of education.* No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-first Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; the Emergency School Aid Act; or the Vocational Education Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

Title IX is an amendment to the Higher Education Act of 1965, and is therefor covered by this prohibition. The Title IX Regulations, however, repeatedly violate Section 1232(a), as well as the constitutional principles I have previously discussed.

As another example, in an amendment to a supplemental appropriations bill passed late in 1974, Congress expressly directed the Department of Health, Education and Welfare:

> "That none of these funds shall be used to compel any school system, as a condition for receiving grants and other benefits from the appropriations above, to classify teachers or students by race, religion, sex, or national origin; assign teachers or students to schools, classes, or courses for reasons of race, religion, sex, or national origin; or prepare or maintain any records, files, reports, or statistics pertaining to the race, religion, sex, or national origin of teachers or students, notwithstanding any other provision or law or any request by any agency of the federal government." *Congressional Record*, p. H10755 (October, 1974).

The offensive and intricate requirements of the Title IX Regulations disregard and violate this Congressional directive.

Finally, it is significant that in 1974 Congress passed a law forbidding states from denying "equal educational opportunity to an individual on account of his or her race, color, sex, or national origin." This law prohibits "segregation by an educational agency of students on the basis of race, color, or national origin," but does not prohibit segregation on the basis of sex. Pub. L. 93-380, 20 U.S.C. Section 1703 Congress has deliberately put sexual segregation on a different footing than racial segregation.

The Title IX Regulations are in apparent defiance of the oft-expressed intention of Congress, illustrated by the three preceding examples.

Many of the institutions of which our members are Presidents have sought to minimize the aid they receive from the government so as to retain their vital independence and academic freedom. At the suggestion of a member of this Subcommittee, we have recently surveyed the members of our Association to determine the amount of federal assistance their institutions are now receiving. Of the 67 who have replied thus far, 20 receive no direct or indirect federal financial assistance of any kind, except that in most cases they enroll students who are receiving federal scholarships or loans; 20 receive assistance amounting to less than 2 percent of their total budgets; 17 receive assistance amounting to 2 to 10 percent or less of their budgets; 4 receive aid amounting to 11 to 25 percent of their budgets, and 6 received small amounts of aid that could not readily be related to percentage of their total budgets.

It is clear that most of our institutions have voluntarily refrained from accepting more than minimal federal assistance so as to retain control over and the academic freedom of their own programs. Nevertheless, the Title IX Regulations would subject nearly all these institutions to pervasive federal controls. The application of the Title IX Regulations should be restricted to programs or activities receiving federal funds directly. Only by this means can the independence and academic freedom of these institutions be preserved. In addition, there ought to be a *de minimus* level at which receipt of small amounts of federal financial assistance would not subject institutions to control in any case.

I have directed this portion of my statement primarily to academic freedom and restrictions on free speech and association. I should also refer to the Regulations' threat to the free exercise of religion. The question of the proper roles of the sexes in society and questions of sexual morality, pregnancy, parenthood and abortion are all matters of religious and ethical significance. Many institutions directed by members of our association are sponsored by or affiliated with religious groups, and many others are vitally concerned with ethical and moral values. The First Amendment protects religious belief and advocacy from government interference.

The Title IX Regulations touch directly on religious questions. For example, they provide that institutions must be blind to the occurrence of abortion—that hiring, admissions, and classroom policies must not take notice of the fact that a person may have had or procured an abortion. (86.40; 86.57) Many religious organizations believe abortion to be immoral and akin to murder. The Constitution guarantees freedom for the advocacy of this widely held opinion and for religiously affiliated or ethically committed institutions to refuse to admit to their association those who reject it.

In an apparent effort to avoid this problem the Regulations have posed an even greater threat to the fundamental guarantee of religious freedom. While purporting to exempt institutions operated by religious groups, Section 86.12 actually requires such groups to prove to the satisfaction of a government administrator that their "religious tenents" are inconsistent with the requiremen of the Regulation. Thus, a government agency reserves the right to judge the content and application of a religious tenet, and, presumably, to deny an institutions' assertion that its religious belief compels a certain action or teaching. By this means government and not the church becomes the final arbiter of religious worship, practice and belief. The First Amendment forbids this. Freedom to advocate and practice religious principles, like the other aspects of academic freedom mentioned above, must be protected from the encroachments of bureaucratic regulation.

Twenty years ago the Commission on Financing Higher Education sounded a warning that the government would extract control of higher education in return for financial assistance.

> "We thrive on our diversities, on the competition of our American life, on our varying institutions and businesses, on our differing interests and loyalties, on the very vitality of our independence, free in its broader aspects from dominance and control. Such independence will be threatened if higher education is subjected to further influence from the federal government. ... Diversity disappears as control emerges. Under control our hundreds of universities and colleges would follow the order of one central institution. And the freedom of higher education would be lost....
>
> "Direct federal control would in the end produce uniformity, mediocrity, and compliance. Verve, initiative, and originality would disappear. . . . This must not be. There must be no such control." *Nature and Needs of Higher Education: The Report of the Commission on Financing Higher Education* (Columbia Univ. Press, N.Y., 1952).

(For a more extensive discussion of the history of government involvement in education see "Principles in Default," remarks of Dr. John A. Howard, President of Rockford College, copies of which may be obtained from our association.)

The danger recognized in these prophetic words has now come to fruition in the stifling welter of federal controls imposed by the Title IX Regulations Only dictation of course content and teaching methods remains to be covered, and even these are presaged in these Regulations.

Our Association is deeply concerned with the diminishing differences among our colleges and universities. A recent report on higher education (U.S. Department of Health, Education, and Welfare, March 1972, p. 12, Frank Newman, Chairman) referred regretfully to what it called the "homogenization of higher education." The report noted that nearly all of the 2500 colleges and universities have adopted the same mode of teaching and learning and that nearly all are striving to perform the same generalized educational mission. "The Traditional sources of differentiation—between public and private, large and small, secular and sectarian, male and female—are disappearing. Even the differences in the character of individual institutions are fading."

Even a cursory examination of the Title IX Regulations leaves no doubt that their effect will be to accelerate this trend toward uniformity. We ought not to risk the destruction of the vital diversity and freedom of American higher education in order to pursue the elusive goal of equity. The desirable goal of equal opportunity can be obtained by less dangerous means. The Regulations must be redrawn to confine their scope to the constitutional and statutory standard. They should be restricted to programs and activities that make direct use of federal funds, and to areas that will not stifle institutional differences in the vital areas of free speech, thought, association and religion.

III. *Universities and colleges should not be required to integrate all instruction and to terminate all policies or practices differentiating between the sexes where no resulting harm to either sex has been shown*

Embodied in the Regulations is the assumption that sexually segregated instruction or any other recognition of differences between the sexes is harmful and must be prohibited. Some of our members choose to follow and are following policies based on such assumptions. In the absence of proof of the superiority of one social theory over another, however, others should be free to choose other policies that they believe will best promote the happiness and freedom of both sexes.

There is, to the best of our knowldege, no evidence whatsoever that an educational system segregated as to sex is harmful to either sex. It cannot be said that such classes are inherently unequal, as was said of racially segregated classes in *Brown v. The Board of Education*, 347 U.S. 483 (1954). Nevertheless, Section 86.34 dictates co-educational classes in every private university or college in every course. This regulation compels the adoption of a particular educational philosophy contrary to the freedom that a private educational institution ought to have to form and pursue its own philosophy.

It appears that Congress did not intend Title IX to require sexual integration of classes. On October 1, 1974, Congresswoman Editor Green, the author of Title IX's ban on sexual discrimination, engaged in the following colloquy with congresswoman Marjorie S. Holt:

> "Mrs. GREEN. It seems to me the people who are administering Title IX are going on the assumption that every group of every institution is guilty of discrimination until they are able to prove themselves innocent. This was never the intention.
>
> "A colleague from Texas has said that in some preliminary work HEW administrators have ruled that the physical education classes must be integrated. It seems to me the local school could decide whether they wanted boys' classes or girls' classes or integrated classes. As I understand the amendment offered by the gentlewoman this would eliminate that kind of nonsense. Schools would still keep records but the power of the Federal Government would not compel them to do certain things never intended by the Congress when it originally passed. Is this not one additional benefit of this kind of an amendment—I would ask the distinguished Representative from Maryland?"
>
> "Mrs. HOLT. Mr. Chairman, if the gentlewoman will yield; yes, it would give direction to HEW. It would point out that this was not the intent of the Congress, that we want the local officials to administer our school system." 120 *Congressional Record* H9757 (October 1, 1974)

Since Congress did not intend Title IX to require compelled coeducation, all such requirements in the Regulations should be withdrawn. By equating co-educational education with nondiscriminatroy education the Regulations foist upon academic administrators the untested and unprovable notion that co-educational classes are somehow "better" than any other kind, despite the subject matter and the approach of the individual professor and despite the educational philosophy of the individual institution.

Following are other instances where the Regulations take unproven educational assumptions and translate them into government directives coercing educational institutions into the same mold:

> The requirement that student teachers may not be trained at off-campus schools that do not conform to the Regulations, without regard to the quality of training offered by such schools (86.31);
>
> The requirement of equal numerical recruiting, forbidding selection on bases other than sexual if these bases would incidentally and unintentially produce sexual imbalance (86.21, 86.22, 86.23);
>
> The requirement of inquiry into the practices of institutions from which students are recruited, without regard to the abilities, accomplishments and attitudes of particular applicants (86.22,23);
>
> The requirements that colleges and universities investigate every company desiring to recruit on the campus to determine whether they have discriminated on the basis of sex. (86.38) (Note the unfairness of imposing on colleges and universities the obligation and expense of enforcing compliance with government policies among organizations outside their control.)
>
> The requirement that institutions offer men's and women's housing in proportion to the number of applicants of each sex, without regard to the difficulties that fluctuations in applications will impose on institutions desiring to have separate buildings for men and women (86.32);
>
> Restrictions on the design, quality, cost and supervision of student housing, without regard to the reasons for existing housing policies and without inquiry into the positive and negative effects of such policies (86.32 to 86.53);
>
> Restrictions on the institutions' right to provide different accommodations for men and women: toilet, locker room and shower facilities for men and women must be "comparable" (86.33);
>
> The requirement that institutions restrict students' choice of where they will live off campus (86.32).

Our Association suggests that the Title IX Regulations be redrafted to provide simply that no student may be excluded from participation solely on the basis of sex in any education program or activity which receives federal financial assistance. This would insure that women, as well as men, students will be granted equal access to federally financed programs but guarantee against federally imposed coeducation no matter how attenuated the relationship between the program or class and the receipt of federal aid.

Another aspect of social theory the Regulations impose is the notion that traditional standards of sexual morality are outmoded and must be eradicated by the Federal Government. Colleges and universities are prohibited from making distinctions concerning abortion or based on pregnancy, parenthood, or marital status, regardless of the order in which they occur (Section 86.40). Furthermore, the Regulations prohibit the imposition of dormitory regulations more protective of one sex than another or from prescribing different appearance standards for men or women. In these and other ways the Regulations limit private institutions in the means they can employ to create and maintain a moral climate on their campuses and to teach certain values by practice as well as precept.

So far as our Association can determine, there is no evidence that persons who cast aside moral restraint are happier, better equipped to meet life, or better citizens. In the absence of such proof, private institutions should be free to advocate such moral standards as they consider most suitable for true education and to exclude from their campuses persons who have offended or may threaten the moral standards and climate these institutions desire to establish. The First Amendment guarantee of freedom of association requires this.

It should be obvious that distinctions can be made between the sexes without denying the equality Title IX demands. Discrimination means to make distinctions between persons based on bias. Distinctions based on reason and fact are not only permissible but desirable. In many cases differences in facilities or instruction may contribute to the welfare of the sexes. We believe the Department of Health, Education and Welfare should deal with distinctions between the sexes on a case-by-case basis without resorting to stifling and inhibiting blanket control. We recommend that the Regulations be confined to general guidelines for equal treatment and that specific programs be left to the wisdom of educational administrators.

This statement has made no reference to the deleterious effect of the Title IX Regulations on athletic programs or the financial burdens the Regulations' record-keeping and reporting requirements will impose on the straightened budgets of colleges and universities. These are grave problems, but they are not discussed here because they are likely to be covered in other testimony submitted to the Subcommittee.

IV. *Conclusion.*

In addition to advocating revision of the Regulations, as stated above, our Association, by resolution adopted unanimously in our last annual meeting, urges Congress, if necessary, to enact a statute clarifying the meaning of Title IX and similar legislation. We propose legislation embodying three points:

(1) An educational institution will not be deemed to have received "federal financial assistance," as that term is used in federal legislation, solely because of the receipt of federal loans, scholarships, grants, or other funds by students who are enrolled at the institution, even when it is anticipated that the students will pay equivalent amounts to the institution as tuition or for other educational purposes.

(2) An educational institution will not be deemed to have received "federal financial assistance," as that term is used in federal legislation, when the total federal financial assistance received by the institution in a particular year does not exceed a specified amount or fraction of the institution's total annual operating budget (such as $300,000 or 5%, or some other figures). (This so-called *de minimis* exclusion, for which there is considerable precedent in other federal regulatory legislation, is meant to protect the private institution that is trying to avoid receiving federal financial assistance but receives some indirectly, or only receives assistance in a minimal amount.)

(3) If an institution is receiving the requisite total amount of federal financial assistance to make it subject to federal regulatory controls, then for purposes of determining the extent to which it will be subject to such controls the language "program or activity" should mean only the constituent program or activity that is receiving such support, and not all programs and activities of the institution. (Thus, for example, the construction of a physical science building with federal loan or grant funds would only subject to federal controls the activities conducted in that building and would not subject to such controls other institutional operations not receiving federal financial support, such as athletics, housing, etc.)

We respectfully submit that enactment of these proposals would permit administration of Title IX in a simple and straight-forward manner. Furthermore, the federal government would be relieved of the expense and burden of administering the sweeping program the Department of Health, Education and Welfare has erected upon the 37 operative words of Title IX.

In concluding my testimony I appeal once again to the members of the Subcommittee to do all in their power to arrest the encroachment of federal control on the educational institutions which have contributed so much to our country's greatness. As direct and indirect federal tax support becomes a more and more significant factor in higher education, Congress should be increasingly sensitive to the danger that well-meaning government administrators will use such assistance as a means of compelling uniformity in all of higher education. The genius of the American system has been its willingness to accommodate individuals and institutions with diverse opinions and to permit the pursuit of truth along diverse paths. Often the most despised idea has proven of the greatest benefit in the long run. So long as our society tolerates diversity, such benefits are possible. As we begin to inhibit opinions, actions, methods of teaching, and academic values not currently in fashion in Washington, innovation and progress will diminish.

The sense of alarm we are trying to communicate on this question is conveyed in a resolution adopted at the annual meeting of the membership of our American Association of Presidents of Independent Colleges and Universities. After affirming our strong support for providing equal opportunity in higher education without regard to race, creed or sex, our member Presidents expressed our "deep conviction that if America's institutions of higher learning lose control of admissions, hiring, curriculum, and campus policy—in effect losing control of who attends, who teaches, and what standards are enforced—private, independent higher education will no longer exist." Because of their tendency to undermine the independence of higher education, we ask the Subcommittee to rescind the Regulations under Title IX.

AMERICAN ASSOCIATION OF PRESIDENTS OF INDEPENDENT COLLEGES AND UNIVERSITIES

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University of Richmond, University of Richmond, Va., Dr. E. Bruce Heilman.
Upper Iowa University, Fayette, Iowa, Dr. Aldrich K. Paul.

Prepared Statement of American Association of Presidents of Independent Colleges and Universities (AAPICU)

The American Association of Presidents of Independent Colleges and Universities (AAPICU) submits the following comments on the regulations proposed by the Secretary of Health, Education, and Welfare to effect the purposes of Title IX of the Education Amendments of 1972, P.L. 92-318, 86 Stat. 373, 20 U.S.C. 1681 *et seq.*

The American Association of Presidents of Independent Colleges and Universities is a nonprofit corporation comprised of over 100 presidents of independent institutions of higher learning located throughout the country. The major purposes of AAPICU are to promote and improve the interests of independent American colleges and universities through interchange of information among members, the establishment of cooperative relations with other associations of private colleges and universities, communication with Federal and State governments, and the education of college and university administrators.

SUMMARY STATEMENT

On behalf of its membership, the Association states that the proposed regulations are in excess of the statutory authority conferred by Congress, violate the academic freedom of those educational institutions subject to them, impose impossible burdens unjustified by the Act's purposes and are so hopelessly vague and ambiguous that they deny the institutions subject to them due process of law.

The AAPICU firmly believes that implementation of the proposed regulations will decrease the overall quality of education in private universities and colleges contrary to the purpose of Congress in enacting Title IX, will eliminate the diversity in higher education that is a major strong point of the American system of higher education, and will place added financial burdens on those institutions which are already under severe financial strains.

The intent of Congress in enacting the Higher Education Act of 1972, including Title IX, was to increase the quality of higher education[1] by assisting private educational institutions to meet their ever increasng financial burdens. Congress recognized that private universities provide diversity to American university life and that the fostering of such diversity by financial aid to such universities was in the national interest.[2]

The proposed regulations violate this Congressional desire. Instead of promoting diversity, the end result of the regulations proposed would be to foster mediocrity. In the name of sexual equality HEW would impose upon all private colleges and universities onerous reporting and compliance requirements which will substantially increase the financial burden these institutions face without any showing that such requirements are necessary to accomplish the statutory goals of Title IX.

For example § 86.35(b) requires a university to insure that many corporations which recruit on its campus do not discriminate in offering employment on the basis of sex. This requirement will necessitate the university's hiring of additional personnel to perform the impossible task of monitoring the employment practices of all these corporations.

The onerous record keeping and compliance reports requirements imposed by § 86.61 will obviously require the hiring of additional personnel to perform the clerical tasks of collecting and organizing the large amount of statistical data that the university will be required to produce.[3]

The housing regulations, § 86.32 and § 86.33 will require, at the very least, additional personnel to inventory all available student housing and then insure that the facilities provided one sex are "comparable" to those provided the other. If they are not, the costs of renovating or remodeling existing structures may have to be incurred.

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[1] 118 Cong. Rec. 39249 (Remarks of Rep. Erlenborn, Nov. 4, 1971).

[2] *See* H. Rep. No. 554, 92d Cong. 2d sess., 1972, U.S. Code, Cong. & Ad. News 2462, 2507 (1972).

[3] See comments of Congresswoman Green, *infra* at page 48.

§ 86.31(c) prohibits the university from permitting its students to participate in any student-teacher program which is operated by a local school district which violates any of the proposed regulations. This requirement obliges a university to monitor the educational and personnel policies of the local district. The additional administrative and clerical costs of performing this monitoring function will obviously be great.

In these and other ways, proper compliance by private universities and colleges will cause precious financial resources to be diverted from the very educational programs which the Act was passed to assist to those administrative and clercal costs that the private university or college will now bear because of these regulations. Since, as Congress was aware, many private universities and colleges are already in dire financial straits, these new costs will only make a bad situation worse.

It is no answer to say that a private university or college that cannot afford the costs of complying with the regulations can always seek increased federal or state assistance. For by doing so, the private college or university surrenders an additional measure of its precious academic freedom to the Government. Thus, the very diversity which Congress sought to foster will disappear as the private university confronts the Hobson's choice of declining all federal aid or of surrendering its freedom to the control of the bureaucracy.

It is realistic to assume that the private university or college which refuses the additional funds will either have to cut back some of its academic programs or, if it is suffering severe financial strains, as may be the case with many of our members, be ultimately forced out of existence altogether. This consequence is the precise opposite of the result intended by Congress, to foster diversity by assisting the private university.

If a private university or college wishes to remain free from the imposition of these burdens, it might be smugly said that all the university need do is refuse federal assistance. However, because of the overly broad definition of federal assistance totally beyond the statutory direction of Title IX, there is a substantial question as to the possibility of a university existing without some "federal assistance" being attributed to it.

Once a university is deemed to be a recipient of "federal assistance" be it ever so small or insignificant, it becomes inextricably enmeshed in the HEW compliance procedure. Under the proposed regulations there is no indication that a university or college receiving minor "federal assistance" to one portion of its program will have any less stringent compliance requirements to the entire institution than another university or college which may receive a major portion of its institutional support from federally assisted programs. Therefore, instead of fostering the diversity of educational opportunities as intended by Congress, the proposed regulations will seriously impair the ability of private universities or colleges to provide such diversity. In this way these regulations have a confiscatory effect. The university will either have to conduct its affairs according to governmental dictates or decline all federal aid and go out of business.

Because the Association believes that these regulations constitute a most serious threat to the viability and freedom of private American education, it submits that all the regulations should be withdrawn and redrafted as suggested herein. By making such suggestions, this Association should not be deemed to be conceding the propriety of any new regulations. This Association expressly reserves its right to make comments when the newly drafted regulations are promulgated for public comment.

I. THE REGULATIONS ARE IN EXCESS OF THE STATUTORY AUTHORITY GRANTED BY CONGRESS FOR THEY SEEK TO REGULATE ALL THE PRIVATE UNIVERSITY'S ACTIVITIES, AND PROGRAMS, INSTEAD OF ONLY THOSE WHICH RECEIVE FEDERAL AID

It is, of course, fundamental that regulations promulgated by an administrative agency may not exceed the statutory authority granted that agency by Congress. These regulations are not so related. Instead, they enlarge the scope of the Act and thus violate the Congressional intent which motivated the Act's passage.

This violation of Congressional intent occurs because of those sections of the proposed regulations which define such words as "federal financial assistance", and "recipient" and which specify the application or coverage of the regulations. For example, § 86.11 provides that:

"Except as provided in this subpart, this Part 86 applies to every recipient and to such education program or activity operated by such recipient which receives or benefits from Federal financial assistance."

§ 86.2(b) then defines "recipient' as follows:

"Recipient" means any State or political subdivision thereof, or any instrumentality of a state or political subdivision thereof, any public or private agency, institution, or organization or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof."

When these regulations are read together, it is clear that the coverage of these regulations extends beyond those university programs or activities which receive federal financial assistance and purport to subject an entire educational institution to the regulations' requirements if any of its activities or programs receive federal financial assistance or "benefit" therefrom.

The unwarranted extension of the coverage of the regulations is obvious. Although Congress prohibited sexual discrimination only in those education programs or activities which receive federal financial assistance this regulation extends that ban to all of an educational institution's activities if any one of them receives federal financial assistance. To compound this error, the inclusion of the words "or benefits" in the definition of the word "recipient" and in the description of the coverage of the regulations further extends the scope. These words, which are not contained in the Act, must have been inserted to permit the Secretary to take the position that all of an educational institution's programs and activities benefit from the rendering of federal financial assistance to any one program or activity. Thus, by grammatical sleight of hand an act of Congress is extended to all the activities of all educational institutions which receive federal aid, in direct violation of the very words of the Act which limit its scope to those programs or activities which actually receive federal financial assistance.

Furthermore, § 1682 provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to *any education program or activity*, by way of grant, loan, or contract other than a contract of insurance of guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken . . . ." 20 U.S.C. § 1682 (1974) (Emphasis supplied).

As this section makes clear, the regulations to be promulgated must be "with respect to the program or activity." The proposed regulations which are not so limited are accordingly in excess of the statutory authority granted by Congress.

Finally, the distinction drawn by Title IX between "administratively separate units", 20 U.S.C. § 1681(c) further evidences a congressional intent to limit the application of Title IX only to those programs and activities which receive Federal funding, not to any program or activity which may somehow remotely benefit by association with a program or activity which is federally funded.

To express the clear Congressional intent that Title IX's prohibition on sexual discrimination should apply only to those educational programs or activities which actually receive federal financial assistance § 86.11 of the proposed regulations should be redrafted to read:

"Except as provided in this subpart, this part 86 applies to each education program or activity which receives Federal financial assistance."

§ 86.2(b), which defines "recipient" impermissibly extends the scope of the Act by subjecting all a private university or college's educational programs or activities to the regulations if any of them receives "or benefits" from federal financial assistance. To guard against this clear violation of Congress' intent that Title IX's prohibition on sexual discrimination extend only to those educational programs or activities which actually receive federal aid. § 86.2(b) should be amended by deleting the phrases "directly or through another recipient", "or benefits" and "including any subunit, successor, assignee, or transferree thereof,". The new regulation would then read:

"Recipient means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended and which operates a education[al] program or activity which receives such assistance."

§ 86.2(g) (ii) defines federal financial assistance to include those scholarships, loans and grants paid by the government directly to students for payment to the institution. Since federal financial assistance is so defined, then such assistance *must* be terminated if the university or college which those students attend fails to comply with these regulations. Such a termination would violate the recent holding of *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969).

In that case a HEW hearing examiner found that a particular school district had made inadequate progress toward student desegregation and was therefore a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1969). He therefore entered an order terminating "any classes of Federal financial assistance arising under any Act of Congress" to the school district.

On appeal, the school district argued that this blanket termination of all federal aid violated U.S.C. § 2000d–1 which provides:

"termination of refusal [of Federal financial assistance for noncompliance with Title VI] shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, *shall be limited in its effect to the particular program, or part thereof*, in which such noncompliance has been so found . . ." 42 U.S.C. § 2000d–1 (1969) (Emphasis added).

The Fifth Circuit Court of Appeals agreed, holding that the HEW order was illegal. By cutting off *all* federal aid to *all* of the school district programs which received federal aid it punished the innocent beneficiaries of those programs which received federal assistance and were not being administered in a discriminatory manner. This result violated the Congressional requirement, expressed in 42 U.S.C. § 2000d–1, that the termination of federal funds be applied therapeutically and not punitively by being limited to those programs from which students had been illegally excluded because of race, color or national origin. The court stated:

"Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application." *Id.* at 1078.

Congress manifested an identical intent to restrict termination to *individual* programs, by incorporating § 2000d–1's language into that of § 1682 (20 U.S.C. § 1682) which provides, *inter alia*:

"Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, or a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and *shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found*. . . . (emphasis added)

If, therefore, as § 86.2(g) (1) (ii) and § 86.68(c) require, noncompliance with Title IX results in termination of veterans' benefits and federal student loans to students this termination would violate the policy of "protection of innocent beneficiaries of programs *not* tainted by discriminatory practices," 414 F.2d at 1075: See also *Gardner v. State of Alabama, Dept. of Pensions & Security*, 385 F.2d 804 (5th Cir. 1967) *cert. denied*, 389 U.S. 1046 (1968). Because Title IX is not aimed at students, but rather is directed at the institution, § 86.2(g) (1) (ii) must be deleted in its entirety lest the students be denied their education because of the alleged failures of the colleges or universities they attend.

§ 86.2(g) (2) should then be amended by striking out everything after the word "therein" in the second sentence. It is customary that, although the original cost of federal surplus property may have been high, it is usually purchased by a university or college at fair market value. The suggested deletion would insure that such a purchase by a university or college at fair market value would not convert this bargain and sale into the providing of federal assistance.

§ 82.6(g) (3) should reflect that, most often, federal personnel do not enter upon a private university or college campus by invitation but because their presence is required by some federal law. Unless they are performing some function for the students which the college or university would otherwise have to provide, their activities should certainly not be deemed the providing of federal assistance to the private university or college. § 82.6(g) (3) should therefore be amended to read "Provision of the services of Federal personnel who provide services that otherwise would have to be performed by employees of the educational institution and whose services are not required by Federal law". Such an amendment would ensure that services provided by Federal personnel which are required by law, and thus not within the discretion of the university to accept or reject, do not of themselves bring the institution within the ambit of the regulations. It would also guarantee that the presence of the ROTC on the university campuses would not bring the university within the coverage of the regulations. Finally, the regulation should be amended to provide that occasional visits by persons employed by the federal government will not be deemed the providing of federal assistance to the university.

§ 82.6(g) (4) should be clarified to reflect the express statutory requirement that the arrangement be for "Federal financial assistance". 20 U.S.C. § 1682. Such clarification could be accomplished by deleting the phrase "or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby." This would eliminate the confusion which would surround attempts to ascertain the intent behind an agreement upon otherwise adequate consideration in a sale or lease of Federal property. The regulation should then be amended by inserting the words "by this Department" after the word "lease" to ensure that the regulations do not exceed the jurisdiction of HEW.

§ 86.2(5) should be amended by inserting the words "administered by the Department" after the word "arrangement". This too would insure that coverage of the regulations would apply only to those programs over which this Department has jurisdiction. Further, there should be a clearer identification of those "contracts, agreements or arrangements" which have as one of [their] purposes the provision of assistance" since it is difficult for the university administrator to divine the purposes of the federal government. Such clarification is accomplished by replacing the words "as one of its purposes" with the words "as its only purposes".

II. THE REGULATIONS VIOLATE THE ACADEMIC FREEDOM OF THE PRIVATE UNIVERSITY

The preservation of the freedom of the colleges and universities is essential to the preservation of freedom in the country. As the Supreme Court has stated:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

Weiman v. Updegraff, 344 U.S. 183, 195 (concurring opinion). "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate. . . ."

Sweezy v. New Hampshire, 354 U.S. 234, 250. *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

Because academic freedom is so essential, the State is disabled from compelling all students to attend public schools by prohibiting or suppressing private schools and colleges. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The State is so disabled because in American civilization the student is not deemed the creature of the state and the State may not dictate his education, nor compel his parents to educate him in some standardized, State imposed way:

"The fundamental theory of liberty upon which all governments in the Union repose excludes any general power of the State to standardize its children by forcing them to accept institution from public teachers only. The child is not the mere creature of the State; they who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id* at 534. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Since the state is so disabled, it may not impose curricula upon the private school by, for example, prohibiting the teaching of a particular subject. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The right of the private university to survive and manage its affairs is, therefore, a part of the liberty protected from governmental invasion by the due process clause of the Fifth Amendment. Furthermore, as explained above, this academic freedom is also protected from governmental infringement because it is the foundation of First Amendment rights. Therefore, any governmental regulation which infringes that freedom is invalid unless it meets certain stringent criteria.

First, the governmental action must bear a reasonable relationship to the effectuation of some legitimate and substantial governmental interest.

Second, although the governmental interest is legitimate, there must be an intimate and obvious relation between that interest and the conduct required by the government action.

Finally, the government must establish that the regulation, which infringes upon protected freedoms, is not overly broad but is the least restrictive means available to accomplish the governmental purpose.

See Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973); *Gibson v. Florida Legislation Investigation Commission*, 372 U.S. 539, 546 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Lewis v. Burley*, 368 F. Supp. 768 (D. Ala. 1973).

These regulations have been drafted without any consideration whatsoever of these constitutional principles or of the deep philosophical difference concerning the education of the young that have always existed in all civilizations. A determination by a university concerning curricula, programs or student activities is but the expression of that university's educational philosophy. Since the federal government is not the repository of all truth, it cannot substitute its judgment for that of the university. If it can, then the guarantee of academic freedom is hollow, indeed.

The necessary consequence of these regulations is obvious. University administrators will be compelled to surrender their educational philosophy and their control of its implications to the federal government, which will impose its own philosophy on all American university life. This is in direct violation of the basic American educational principle that students are not the creatures of the state.

Furthermore, Congress has expressly rejected the imposition of federal direction, supervision or control over the curriculum, program of instruction, administration, or personnel of any educational institution. 20 U.S.C. § 1232(a) (1974) provides:

"Prohibition against Federal control of education. No provision of the Act of September 30, 1950, Public Law 874, Eighty-first Congress; the National Defense Education Act of 1958; the Act of September 23, 1950, Public Law 815, Eighty-first Congress; the Higher Education Facilities Act of 1963; the Elementary and Secondary Education Act of 1965; the Higher Education Act of 1965; the International Education Act of 1966; the Emergency School Aid Act; or the Vocational Education Act of 1963 shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration or personnel of any educational institution, school, or school system, or over the selection of library resources, textbooks, or other printed or published instructional materials by any educational institution or school system, or to require the assignment or transportation of students or teachers in order to overcome racial imbalance."

Since Title IX amended the Higher Education Act of 1965, the regulations promulgated pursuant to Title IX are invalid whenever they purport to impose the direction, control or supervision of the federal government upon the curriculum, or administration of any educational institution. As will be demonstrated herein, the present regulations obviously violate this section because they mandate the transfer of the management of the private university from the hands of its administrators to the hands of the bureaucrats. For this reason alone the present regulations must be withdrawn. Each of them should then be redrafted in accordance with the constitutional principles explained above and in accordance with the constitutional principles explained above and in accordance with the Congressional directive of 20 U.S.C. § 1232(a). Specifically, each regulation must be redrafted to insure, first, that its requirements are intimately and reasonably related to the statute's purposes and constitute the least restrictive means available of accomplishing those purposes. In this redrafting process, there must be constant recognition of the commands of § 1232(a) so that any attempt to foist federal control upon a college or university is summarily and completely rejected. Finally, in order to preserve academic freedom it should be presumed that the good faith judgment of academic administrators is entitled to the greatest weight. This presumption would then operate to require a finding that a complainant has been selectively and arbitrarily denied the benefits of an educational program or activity receiving federal assistance solely because of sex. Finally, the complaint of discrimination should be dismissed if it is predicated on a practice or policy which the university administrator had adopted pursuant to his institution's educational or religious philosophy.

Once this presumption is recognized and the regulations are redrafted according to the constitutional principles explained above, the conflict between them and academic freedom, albeit not eliminated, will at least be lessened.

In the succeeding sections, this Association will indicate how these regulations trample on this academic freedom and impose requirements so onerous that compliance with them is impossible.[4] It will also show that in many cases the requirements imposed are unjustified by the statute's language, its legislative history and its purposes. Indeed as will be indicated, these regulations foist upon private universities requirements of sexual equality which are not even imposed on profit-making companies or governmental entities. In fact, many of them seem to have been drafted to use the private university as a testing ground for new concepts of sexual equality which have never received judicial or legislative recognition.

If possible, the Association will suggest modifications which, as explained above, should not be construed as approval of any new regulations since this Association reserves its right to comment on any such new regulations.

Before doing so this Association is compelled to point out that § 86.12 constitutes an outrageous and flagrant violation of academic and religious freedom.

This regulation permits the Director to arrogate to himself the right to determine whether the religious tenets of an educational institution justify an exemption. Such arrogation permits a secular official to evaluate the bona fides of a religious philosophy and its educational ramifications and to seize from religious officials their sacred obligation to specify the consequences of their faith in their university's life. A more outrageous violation of academic and religious freedom could scarcely be imagined.

Since any attempt to regulate this area is so fraught with constitutional difficulties, this Association suggests, indeed demands, that the regulation be withdrawn and that no new regulation in this area be attempted. This Department must recognize that in the sacred area of religious freedom it is, by virtue of the First Amendment, without jurisdiction for the exercise of its regulatory power.

III. THE REGULATIONS IMPOSE IMPOSSIBLE BURDENS ON THE PRIVATE UNIVERSITY WHICH VIOLATE ITS ACADEMIC FREEDOM AND WHICH ARE UNJUSTIFIED BY THE STATUTE, ITS HISTORY AND PURPOSES

(a) *Remedial and Affirmative Action* (*§ 86.3*)

§ 86.3 requires either remedial or affirmative action as is "necessary" to overcome the effects of previous discrimination.

First, the scope of the words "remedial" and "necessary" is left undefined so that the Director can, in his sole discretion, determine what a university must do to overcome the effects of past discrimination and when such conduct is required. This undefined "atonement for past sins" leaves university administrators in the impossible situation of never really knowing when they must and how they must comply with the new law. It leaves the university subject to the whims and prejudices of a governmental administrator operating without valid and definitely stated standards.

Furthermore, the legislative history is barren of any indication that Congress intended any retroactive application of the law. On the contrary, by providing for transition in formerly single sex schools over an extended period. Congress impliedly recognized that the implementation of this new law would take time. Instead of allowing for a transitional period, these regulations require immediate compliance and mandate "remedial" action for conduct which university administrators took in good faith since the law had then exempted educational institutions from the ban on sexual discrimination. This regulation should therefore be eliminated.

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[4] § 86.8, by requiring the University to designate an employee to coordinate compliance with the Director is a tacit recognition of just how arduous that compliance will be.

(b) Dissemination of Policy (86.9)

§ 86.9 requires that the literature disseminated by the university contain notifications which the Director deems necessary to advise applicants of the law.[8] This requirement imposes upon overburdened university or college budgets the unnecessary costs of stating the obvious. To pretend, in this age of mass media, that intelligent young men and women need such notification to be aware of the law's provisions is, with all due respect, ludicrous. This provision too should be eliminated since it imposes an absolutely unwarranted financial burden upon the university.

(c) Admissions and Recruitment Policies (§ 86.14 through § 86.23)

Decisions as to the makeup of the student body are an essential part of an institution's policy making function. Some colleges and universities may have been created with the intent to serve the local community so that their admissions policy, by design, prefers local students. Other universities or colleges may want the most diverse student body possible and search out students from the entire nation and foreign countries. Because of §§ 86.21, 86.22 and 86.23 the making of these policies will be transferred to the federal government because the regulations deny any such selectivity if, by *unintended* consequence, it has the effect of discriminating on the basis of sex.

The impossibility of complying with these regulations and their interference with the university's academic freedom are obvious.

A particular university may determine that it will admit a certain number of students to its graduate program from a university in a foreign country, where, because of that country's culture, many more men are educated than women so that all the potential applicants are men. If the university were to accept these students, § 86.22 would be violated, although the university administrator rightly concluded that the presence of these students would be beneficial to the entire university.

Similiarly a university administrator may have learned that students from a particular undergraduate college have brought particular credit to his university's graduate program in some specialized field. Under § 86.22 the university administrator must somehow ascertain whether that undergraduate college has admitted students "predominately" of one sex, although this will burden him with determining whether another university has practiced sexual discrimination. If he can so determine and concludes that the undergraduate college has discriminated, he must reject its applicants to the graduate school. The brutal unfairness of rejecting those most qualified is the precise opposite of fairness for it punishes students because of their attending a particular undergraduate school. Indeed, these regulations obviously compel either the imposition of "benign quotas" or the complete exclusion of certain qualified students.

Finally, the regulations make the administrators task even more arduous by outlawing, in § 86.21 any test which adversely affects any person on the basis of sex unless the test is shown to predict successful completion of a particular program or activity. Although the testing of intelligence and the predicting of academic success is hardly an exact science, these regulations assume that a nondiscriminatory test can be quickly validated.[9] How is a university or college administrator to comply with this provision? How is he to validate a test, using the resources available to him? May he accept the assertion of the entity supplying the test that it does not discriminate or must he make independent inquiry? This regulation gives him absolutely no guidance and thereby compels each college and university to attempt to set a uniform admissions policy in complete uncertainty as to its legality.

The regulations concerning admissions should therefore be completely revised. The new regulations should outlaw only preference on the basis of sex or limiting quotas. In this manner, equality of access will be preserved without the transfer of admission policy-making to the federal government with the consequent surrender of academic freedom.

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[8] Since the regulations will probably go into effect during the spring semester, they will require the reprinting of all those materials already printed for the following semester.

[9] § 86.42 and § 86.21(2) which prohibit a college or university from using any test for the purposes of employment unless it is shown to predict successful performance in an employment position, are equally impossible to obey.

(d) *Housing and Dress Rules* (§§ *86.31–86.33*)

§§ 86.31 and 86.32 impose upon university student life equally false notions of "equality" between men and women by denying university administrators the right to impose different rules and regulations for women students who reside in domitories and off campus housing. When this regulation is tested according to its relation to the statute's purposes, it is obvious that it is invalid. It is illogical to say that a woman student who must return to the dormitory at a specific time and who is otherwise sharing in the fullness of university life is somehow being excluded, because of her sex, from some activity which is receiving or benefitting from federal aid. Furthermore, the composition of different rules for women is but the recognition that the college or university often finds itself in *loco parentis*, responsible for the health and safety of its students. On all too many university campuses, crimes, and sometimes violent ones, have occurred. Since one cannot assume that whenever women students leave their rooms they will be in the company of men, requiring women to return at an earlier hour and thereafter locking the dormitory doors are most reasonable precautions for their safety. Since the federal government cannot and will not become the guarantor of the students' safety, the university administrator must not be denied his right to take reasonable precautions to avert tragedy.

The same considerations may necessitate that, if only a limited amount of off campus housing is available, it be allocated to male students. Such a policy, although permitted by § 86.32(b)(1) arguably would violate the other sections of this regulation because, for example, it is not comparable in "quality".

Indeed insofar as these regulations apply to off campus housing, they are impossible to comply with since the university is hardly in a position to dictate "quality" and "cost" in the surrounding real estate market.

Therefore, since any regulation in the area of housing would be such a futile exercise, this Association suggests that § 86.32 be withdrawn or modified to prohibit only the imposition of different fees for different sexes in the housing which the college or university itself provides which was built with federal funds. Furthermore, it is suggested that any new regulation acknowledge that it is traditional that universities and colleges hire resident assistants who live in their dormitories to maintain discipline and serve as counsellors to the students. Lest this legitimate policy be mistakenly prohibited the new regulations should contain the express provision that nothing in them shall prohibit the hiring of members of one sex when it is a condition of such employment that the employee be either required or permitted to reside in a dormitory. This would permit the university to have one-sex dormitories or to hire married couples for these positions.

Finally, and perhaps most importantly, this Association must assert its members' right to create a moral climate upon their campuses and to thereby require that the students conform their behavior to certain ethical precepts, whether or not such precepts are grounded in a particular religion. Accordingly, colleges or universities are well within those rights when they require that their students conform their behavior and their dress to the appropriate demands of modesty and self-control. Accordingly, any portion of these regulations which purports to invalidate parietal rule, dress codes, or restrictions on members of one sex entering the dormitory of the others, invade those rights. It is not for the federal government to dismiss these ethical precepts as antiquarian or victorian and to impose a governmental official's ethical values, or lack of them, upon university or college students. On the contrary, it is for the college or university administrator to infuse the university or college's life with moral values appropriate to the institutional mission and to advise students who do not wish to conform their dress or behavior to such moral values that they are free to seek their education elsewhere.

(e) *Compelled Coeducation*

§ 86.34 dictates unisex classes in every private university or college in every course. This regulation compels the adoption of a particular educational philosophy contrary to the freedom that an educational institution ought to have to form and pursue its own philosophy. There is little or no evidence that co-educational classes are, in any way, superior to separate classes. It cannot be said that such classes are inherently unequal, as was said of racially segregated classes in *Brown v. The Board of Education*, 347 U.S. 483 (1954).

Such compelled co-education cannot be justified for it is now apparent that Congress did not intend Title IX to require it. On October 1, 1974, Congresswoman

Green engaged in the following colloquy with Congresswoman Holt,[7] the sponsor of Title IX's ban on sexual discrimination:

Mrs. Green. It seems to me the people who are administering Title IX are going on the assumption that every group or every institution is guilty of discrimination until they are able to prove themselves innocent. This was never the intention.

It seems to me the amendment which our colleague has offered goes to this question. It may not be in the exact words I would prefer. But let me add one other example why this kind of an amendment needs to be passed today and considered by the conference committee.

A colleague from Texas has said that in some preliminary work HEW administrators have ruled that the physical education classes must be integrated. It seems to me the local school could decide whether they wanted boys' classes or girls' classes or integrated classes. As I understand the amendment offered by the gentlewoman this would eliminate that kind of nonsense. Schools would still keep records but the power of the Federal Government would not compel them to do certain things never intended by the Congress when it originally passed. Is this not one additional benefit of this kind of an amendment—I would ask the distinguished Representative from Maryland?

Mrs. Holt. Mr. Chairman, if the gentlewoman will yield; yes, it would give direction to HEW. It would point out that this was not the intent of the Congress, that we want the local officials to administer our school system. 120 Cong. Rec. H9757 (Oct. 1, 1974).

Since Congress did not intend the Title IX to require compelled coeducation, this regulation must be withdrawn for by equating co-educational with non-discriminatory education it foists upon academic administrators the untested and unprovable notion that co-educational classes are somehow "better" than any other kind, despite the subject matter and the approach of the individual professor and despite the educational philosophy of the individual institution.

Therefore, the Association suggests that the regulation be redrafted to provide simply that no student may be excluded from participation in any education program or activity which receives federal financial assistance solely on the basis of sex. This would insure that women students will be granted equal access to federally financed programs but guarantee against federally imposed coeducation no matter how attenuated the relationship between the program or class and the receipt of federal aid.

Furthermore, the Congressional reaction to these proposed regulations quoted above further indicates that §86.31(b)(7) and the Secretary's interpretation of it, as stated in the Preamble, are invalid insofar as they purport to outlaw university recognition of single sex clubs or organizations. If Congress did not intend compelled co-educational classes then, *a fortiori*, it did not intend compelled co-educational clubs, fraternities or sororities. On the contrary, in Congressional debate quoted above, Congresswoman Green noted the foolishness of those who interpret Congress's passage of Title IX to require the intergration of the Boy Scouts and the Girl Scouts, or the YMCA and the YWCA. Thus, § 86.31(b)(7) must be withdrawn lest the university be compelled to violate the First Amendment Rights of its students who have voluntarily associated with each other in these organizations, knowing of their single-sex membership policies.

Finally the compelled co-education requirements fail to acknowledge that certain extra-curricular activities ordinarily are held within the dormitories such as a cooking or home economics class within the dormitory kitchen. The regulations should therefore be prefaced with the caveat that a university may restrict participation in a particular activity or program to members of one sex if prior to the adoption of regulations such activity or program was conducted within a dormitory.

(f) Placement Policies (§ 86.35(b))

§ 86.35(b) impose upon the university the impossible burden of extending its powers beyond the campus and compelling independent profit making institutions to change their employment policies if such policies cause discrimination on the basis of sex.

This subsection requires a university to insure that the hundreds of corporations which recruit on its campus do not discriminate in offering employment on the basis of sex, and therefore requires the university to monitor the employment practices of every such corporation. Since it often takes years of litigation to establish that a corporation has discriminated on the basis of sex, the university will have to undertake a responsibility that it simply cannot meet. First the university will have to prohibit the corporation from recruiting as soon as a charge of sexual discrimination is levelled against it and await the outcome of the proceeding brought against the corporation, even if the charge could prove baseless. For, if the university does not prohibit the corporation from recruiting while the charge is pending, the final determination that the corporation has violated the law subjects the university to loss of its federal aid. Furthermore, while the charge is pending, the university will have to prohibit any of its professors from giving letters of reference to students who apply to the corporation since such letters could be deemed to be the assistance of the university. These regulations must therefore be deleted for there is no authority for either imposing this policing obligation on the universities or making them part of the enforcement machinery of the federal government.

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[7] This Association must note the significance that this colloquy took place between two women members of Congress.

(*g*) *Student Teacher Programs* (*§ 86.31*(*c*))

Similarly, § 86.31(c) requires colleges and universities to insure that the local educational system to whom it may provide student teachers complies with all the rules specified in § 86.31(b). Accordingly, if a local public or private secondary school has a different dress or behavior code or maintains separate physical education or health classes for its girl and boy students the university would be compelled to terminate its relationship with that school. As a result colleges and universities are being used by the Director to punish those local schools who do not conform to his dictates. This consequence cannot be countenanced for it is now obvious that Congress never intended to compel co-educational classes in every subject throughout the nation. Furthermore, the regulation exceeds the statutory authority granted for it applies to *all* student teaching programs whether the university or local school receives federal financial assistance for those programs or not. Therefore, the regulation should be withdrawn.

(*h*) *Appraisal and Counseling Materials* (*§ 86.34*(*c*))

§ 86.34(c) is, as a matter of English grammar, incomprehensible since it is impossible to understand how inanimate objects, i.e. "materials", can "permit" or "require" different treatment of students on the basis of sex. Furthermore, this regulation seems to compel universities not to recognize that, as a matter of the science of psychology, testing materials which do not account for the difference in sex may be useless. Accordingly, any attempt to regulate in this area should be abandoned as futile.

(*i*) *Single Sex Scholarships* (*§ 86.35*)

In § 86.35 the Director outlaws the distribution of financial assistance under a trust or will which restricts its receipt to members of one sex. Therefore, all colleges and universities risk loss of federal aid if they comply with the wishes of grantors or testators. Such bequests may constitute a substantial portion of the institution's endowment, or at least, of its budget for student assistance. If the institution attempts to distribute a gift in violation of the donor's intent litigation by a residual beneficiary against the college or university is a certainty. So is alienation of potential donors. To avoid such costly litigation, the university or college may have to return the gift or, if that is not possible, make some other disposition of the funds, with the threat of costly, uncertain and lengthy litigation hanging over its head.

It is no answer to say that the equitable concept of "cy-pres" will relieve the universities or colleges of their problem of somehow resolving the conflict of the donor's intent and the requirements of the regulation. First, sexual discrimination, unlike racial discrimination, has not yet been declared to be against public policy and therefore the concept of cy-pres may not be applied by the courts. Secondly, in order to invoke cy-pres a college or university, by necessity, will have to engage in litigation to resolve the problem. This is unrealistic for the endowments of $5,000 to $50,000 that fund many such scholarships and institutional budgets simply cannot afford the legal fees that can be anticipated. It should be noted that the now famous Gerard College case was one of the more protracted and complex cases. The near certainty that similar litigation will involve other colleges and universities is frightening.

Finally, it is impossible, as a matter of law and logic, to construe the distribution of private funds by universities as an educational program or activity which receives federal financial assistance. Since such funds are not given by the government, the government is utterly without jurisdiction to regulate their distribution and the present regulation should be withdrawn.

(*j*) *Athletics* (§ *86.38*)

The proposed regulations, in § 86.38, also purport to eliminate sex discrimination in athletic programs. However, the coverage of § 86.38 exceeds the statutory mandate of Title IX that: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the beenfits of, or be subjected to discrimination under *any education program or activity receiving federal financial assistance* . . ." 20 U.S.C. § 1681 (Emphasis added). The stipulation of section 86.38(a) that no one be discriminated against on the basis of sex "in any physical education or athletic program operated by a recipient . . . ." contravenes on its fact the express requirement of section 1681 that Title IX be limited to "any education program or activity receiving federal financial assistance." 20 U.S.C. § 1681. In order to better comply with the statutory mandate, § 86.38 should be amended by deleting the last part of the subsection beginning with "operated by a recipient" and ending with "competitive skill", replacing the deleted section with language reflecting the intent of the statute to apply *only* to programs receiving federal financial assistance directly.

The rest of § 86.38 suffers from similar defects in terms of vagueness and statutory coverage. The AAPICU concurs fully in the *Comments of the National Collegiate Athletic Association to the Department of Health, Education, and Welfare on the Proposed Regulations on Title IX of the Education Amendments of 1972* (September 27, 1974), which fully analyzes the weaknesses and inconsistencies of § 8636.

(*k*) *Fringe Benefits* (§ *86.46*)

§ 86.46(b) of the proposed regulations prohibits a recipient from operating or offering a fringe benefit plan which provides for different benefits on the basis of sex. The Secretary, in the preamble to the proposed regulations, indicated that he will interpret § 86.46:

"To require, where an institution's female permanent employees are disproportionately part-time or its permanent part-time employees are disproportionately female, and the institution does not provide its permanent part-time employees fringe benefits proportionate to those provided full-time employees, that the institution demonstrate that such a manner of providing fringe benefits does not discriminate on the basis of sex. "Permanent" would refer to any employee who is expected to work or has in fact worked at least one academic semester at half-time or half-time equivalent. The Secretary seeks comment on the implications of requiring all institutions to provide permanent part-time employees fringe benefits proportionate to those offered full-time employees, regardless of the relative composition of a particular institutions's part-time and full-time employment among its female employees." 39 Fed. Reg. 22231 (June 20, 1974).

First of all, the preamble and the regulation are incomprehensible because the essential word "disproportionately" is left undefined. Before any regulation be attempted in this area, the Director must make clear, by specific examples, when a university's part-time employees will be deemed "disproportionately" female.

Secondly, the definition of "permanent" apparently indicates that as soon as a part-time employee has worked one full academic semester, he must be enrolled in the unviersity's pension or retirement plan. Accordingly, if a student should work one semester and then leave the university for an extended period of time, his return to school and part-time employment would require his receiving all fringe benefits, including enrollment in a pension plan. The bookkeeping costs of maintaining the necessary records also will be astronomical.

Finally, the compelled entitlement of part-time employees to enrollment in pension plans and other fringe benefits makes no economic sense. In most universities, most part-time employees are students who work to defray the cost of their education. Upon graduation they will, of course, seek employment elsewhere to obtain a salary comensurate with their education. Since their employment by the university will be for such a short duration, enrolling them in pension plans would be a meaningless exercise. Furthermore, the insurance carriers who underwrite such plans will have to charge the university higher prices to defray their administration and additional coverage costs.

The Secretary's proposed interpretation of § 86.46 is apparently based on the erroneous assumption that men and women are *identical*, rather than possessed of equal rights. The Supreme Court, in *Geduldig v. Aiello*, 42 U.S.L.W. 4905 (U.S. June 17, 1974), recognized the fundamental error of requiring that men and women be treated identically rather than equally. In ruling that a state employee disability insurance plan which did not cover normal pregnancies and childbirths did not constitute invidious discrimination on the basis of sex, the Court commented on the lack of a constitutional basis for forcing a state government to change its policies merely because the effect was not to treat men and women identically. Justice Stewart's language in a footnote to the majority opinion illustrates the distinction between discrimination based on sex and different treatment based on a condition which happens to affect more women than men.

"The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra*, and *Frontiero, supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes. 42 U.S.L.W. at 4908 n.20.

Similarly, while there may be more female part-time employees than there are male part-time employees, under Title IX there could be no discrimination on the basis of sex as to benefits payable to full-time employees. Forcing the inclusion of part-time employees in the benefits program, aside from imposing outrageous costs on the already beleagured university budget, could not be constitutionally justified under *Geduldig*, because the decision not to extend benefits to parttime employees is not designed to discriminate but rather is a reasonable policy decision to limit coverage to full-time employees. Thus, the interpretation of § 86.46 proposed by the Secretary would be a costly and unconstitutional incursion into the freedom of universities to set up reasonable employment policies and practices.

(l) *Pregnancy and Maternity Leave (§§ 86.21 (2) and (3); § 86.37 (a) and (b); § 86.47)*

The *Geduldig* holding is useful in analyzing other aspects of the proposed regulations, especially those which mandate that pregnancy childbirth, miscarriage and abortion be treated as a temporary disability for the purpose of participation in educational programs or employment by the university. E.g. § 86.21(2) and (3); § 86.37(a) and (b) and § 86.47.

For example § 86.21, which specifies that "[no] person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission by any recipient," also prohibits consideration of an applicant's "actual or potential parental, family or marital status . . . which treats persons differently on the basis of sex," and forbids discrimination or exclusion of any person "on the basis of pregnancy, childbirth, miscarriage, abortion, or recovery therefrom. . . ." The effect of § 86.21 is to preclude a university from making a policy decision that applicants of a certain marital or parental status be treated differently from others irrespective of sex, because the result might be to treat persons of one sex differently than those of the other. Thus, the university is forced to abdicate a good part of its policy-making to the Federal government, even where its policies do not discriminate on the basis of sex but rather make reasonable classifications based on marital or parental status because of financial or other important considerations. The elimination or modification of § 86.46(c) so as to allow for admissions policies based in part on marital or parental status where such policies applied irrespective of sex would give recognition to the equality of the sexes without forcing the university to bear the impossible burden of making the sexes identical.

Furthermore, § 86.37(b) compels a university to treat pregnancy as justification for leave of absence and requires that the student who tak[illegible]ch a leave of absence be reinstated to her original status, even if the university has no similar policy for its men students. Therefore, the regulations give pregnant students a preference, in violation of the equality which they purport to foster. Indeed, if by virtue of her pregnancy, the female student misses examinations or fails to meet the attendance requirements of a particular course she must be reinstated, and, one assumes, be given the preference of either being granted course credit, although she has failed to meet the course's requirement, or be permitted to make up the classes or the exams she missed. Since a physically ill male student may have no such rights, these regulations give an unwanted preference to women students.

Finally, by requiring that abortion and out of wedlock pregnancies be treated the same as pregnancies and childbirth in wedlock these regulations deny university administrators their most fundamental freedom to set a moral climate in their university's life. For an educational institution which is operated by a religious organization, these regulations would compel it to surrender to the federal government its right to exclude from participation in its university's life those students who have violated most greviously the divine commands recognized by their faith. It is no answer to say that such institutions can seek an exemption under § 86.12. That section, as noted previously, grants to the Director the right to decide whether the religious levels of a faith justify any exception to the regulations, and there is no guarantee that the university's decisions will meet the Director's criteria. Accordingly, the right of the university to inculcate moral precepts is transferred to the federal government which would impose it own ethical standards upon all university students.

For the private university, not affiliated with a religious organization, the violation of its freedom to set moral standards is even more outrageous. Since it cannot qualify for the religious exemption, it is left no choice but to permit the federal government to substitute its concepts of morality upon university administrators who may find such concepts morally degenerate and bankrupt.

Therefore, the regulations should be withdrawn to delete any reference to abortion and to specify that a university need not grant any leave of absence to any pregnant student unless she is married. Furthermore, to avoid preferential treatment the regulations should specify that in the providing of any educational program or activity which receives federal financial assistance a university shall grant to pregnant women the same rights to leaves of absence as it does to its men students.

(m) *Record Keeping Requirements (§ 86.61)*

§ 86.61(b) of the proposed regulations requires each recipient to:

Keep such records and submit to the Director timely, complete and accurate compliance reports at such times, and in such form and containing such information as the Director may determine to be necessary to enable him or her to ascertain whether the recipient has complied or is complying with this part.

The unbridled discretion given to the Director by this section is disturbing, particularly when the burden on private institutions of preparing such reports is considered. The requirements of section 86.61(c) that the institution allow free access to the Director of its records and that the institution try to obtain any records that are in "the exclusive possession of any other agency, institution or person" adds to the onerous burden the institution must bear.

Congresswoman Edith Green, one of the original sponsors of the legislation leading to Title IX, made these observations:

"I authorized title IX of the Higher Education Act and I have almost come to the conclusion that the people who are enforcing that and writing the rules and regultaions are determined that it shall not work. Let me give a few additional examples . . .

"In my city we have Reed College, historically a very liberal college. We know there is a surplus of professors—including Ph. D.'s. There were very few vacancies and I am told there were somewhere around 1,000 applicants. The regional office of HEW ordered Reed College to give them a written report on the background and qualifications and experience and race and sex of every person who applied and why they were not hired. Reed College has said it would take three people full-time just to do the paper work, and after that they have accomplished nothing. Financially hard-pressed private colleges cannot afford that kind of nonsense." 120 Cong. Rec. H9756 (October 1, 1974).

Considering the compliance information that is already required under Titles VI and VII of the Civil Rights Act of 1964, and the Equal Pay Act, it would seem that the Director could easily ascertain whether or not a particular institution is complying with Title IX by reviewing the Civil Rights and Equal Pay reports of the institution.

§ 86.61 of the proposed regulations should be deleted in its entirety since, unlike the Civil Rights and Equal Pay Acts, there is no statutory authority in the Act for the Director to require the record keeping and compliance reports imposed by this regulation.

IV. THE PROPOSED REGULATIONS VIOLATE DUE PROCESS OF LAW BECAUSE THEY FAIL TO GIVE ADEQUATE NOTICE OF THE OBLIGATIONS IMPOSED BY THE DIRECTOR ON EDUCATIONAL INSTITUTIONS

It is a fundamental requirement of due process that regulations promulgated by an administrative body must give due notice of the obligations they impose. *United States* v. *Pennsylvania Industrial Chemical Corporation* (PICCO), 411 U.S. 655 (1973), dealt with the question of administrative notice in the context of a criminal conviction for violation of Section 13 of the Rivers and Harbors Act of 1899. In holding that PICCO was entitled to present evidence in support of its claim that it had been administratively misled the Court said that:

> To the extent that the regulations deprived PICCO of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution. *Id.* at 674.

Although the proposed regulations do not involve criminal sanctions, violation of them results in a loss of needed funds to the university (in many respects equivalent to a fine) so the same "traditional notions of fairness" should apply to the notice of those obligations sought to be imposed by the regulations.

The vagueness of the proposed regulations is also intolerable because, as explained above, the conduct sought to be regulated is protected by the First Amendment guarantee of academic freedom, and the courts have consistently held that vagueness in statutes which seek to regulate First Amendment freedoms are at variance with the robust and full exercise of constitutional rights. *Scull* v. *Virginia*, 359 U.S. 344, 353 (1959). *See also Flaxler* v. *United States*, 358 U.S. 147, 150–51 (1958).

The sections which purport to describe the coverage of the regulations, such as §§ 86.11, 86.2(g) and 86.2(h) are especially unclear. Because of the overbreadth of § 86.11, and the vagueness of the definitions of "federal financial assistance" and "recipient", the institution which receives even a small amount of federal financial assistance is forced to consider virtually every one of its programs as covered because the regulations give the institution no indication whatsoever of whether or not the Director will consider any one program as having "benefitted" from the receipt of federal financial assistance.

The fear of violating such an unclear law will induce a university to err on the side of caution and surrender its policy-making functions and freedoms to the federal government by considering every program, class and policy as being covered by the regulations. Therefore the *in terrorem* effect of these vague regulations compels the university to conform rather than run the intolerable risk of the Director's adverse determination and the consequent loss of funds.

Similarly, the provisions of § 86.3(a) respecting remedial action to correct "previous discrimination" gives no indication whatsoever of what constitutes "previous discrimination." Therefore, the school must try to "second-guess" the Director in determining whether or not to commit a significant portion of its resources to implementing such "remedial action." Furthermore, by instituting such "remedial action", the school may be performing an unnecessary act if, under the requirements of Title IX, it did not previously discriminate but was not sure how the Director might rule, given the almost unbounded discretion conferred upon him by § 86.3(a).

The proviso of § 86.3(b) that absent prior discrimination "a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex" is not only self-contradictory on its face, but also raises serious questions concerning what difference, if any, there is between "remedial" and "affirmative action." The only ascertainable difference is that § 86.3(a) requires the institution to take remedial action to overcome discrimination, while § 86.3(b) allows the recipient its choice as to whether or not to take affirmative action to overcome discrimination. The only real difference between "the effects of such previous discrimination" (§ 86.3(a)) and "the effects of conditions which resulted in limited participation therein by persons of a particular sex" (§ 86.3(b)) is in the number of words used to describe the same thing: past sex discrimination. The regulations offer no indications of what constitutes past sex discrimination. Thus, for a recipient to determine which subsection of § 86.3 it must (or may) comply with, it must either risk noncompliance with the regulations on grounds known only to the Director, or it must adopt "remedial" or "affirmative action" irrespective of any real need to do so. The best way to remedy the vagueness of § 86.3 would be to eliminate it entirely. Absent total deletion § 86.3(a) should be deleted and § 86.3(b) clarified, to reflect the intent of Title IX that sex discrimination be eliminated, and that the institution need not atone for policies that might have violated Title IX had it been enacted earlier.

In other regulations, use of such terms as "comparable efforts to recruit" (§ 86.23(a)), and "comparable facilities" (§ 86.33) raise serious question as to what a recipient is required to do in order to comply with the regulations. In reference to the latter regulation (§ 86.33), the specter of a horde of federal inspectors descending on a campus in order to court bathtubs, lockers, and shower heads, would likely be enough to force a university to set up rigid quotas and ratios, a result which clearly contravenes the legislative intent behind Title IX.

Furthermore, the word "comparable" is not suspectible of easy application in a community as diverse as the American university community. For example, is the policy of recruiting professors from only coeducational universities invalid because, by not recruiting at all women colleges, the university is not making a "comparable" effort to recruit women? Does a geographical preference for either students or employees violate the regulations if the area selected contains more men than women? Is the policy of financially assisting male law students in their education by employing their wives illegal if there is no "comparable" effort to recruit men for the jobs?

Such questions indicate how impossible it is to apply the words "comparable" and how its use in these regulations will cause university administrators to spend many hours trying to guess at what the law requires. Such vagueness violates the fundamental rights of due process. Although dealing with state statutes, *Bagget* v. *Bullit*, 377 U.S. 360. 367 (1964), stands for the general principle that:

> [A] Law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

The proposed regulations violate these due process requirements.

CONCLUSION

For the reasons indicated above the American Association of Presidents of Independent Colleges and Universities submits that the proposed regulations should be withdrawn and revised to accord with the intent of Congress, to be within the scope of the Congressional enactment, and to be free of vagueness, uncertainty and constitutional violations, as pointed out above. New proposed regulations which meet these objections should be issued and adequate opportunity afforded for comments thereon.

Respectfully submitted.

DAVID ANDREWS,
President.

Mr. SIMON. Thank you very much.

Mr. Andrews, do you have any questions?

Mr. ANDREWS. I have no questions.

Mr. SIMON. Mr. Blouin.

Mr. BLOUIN. I have a few questions, if I may.

I get the distinct impression that we are both reading different regulations. I see nothing in here, quite frankly, that would force any institution, under any circumstances, to function against their religious principles. They are specifically protected within the confines of the rules as written.

Quite honestly, this is one of the first things I checked because I happen to have 10 liberal arts private colleges in my district alone and 18 postsecondary institutions, all but 3 of which are privately owned, and almost all of which are religiously oriented. I see nothing in here that is going to inhibit any one of them in any manner, shape or form from functioning as they always have.

Could you be a little more specific, maybe, and show me where in the rules you see that direct conflict? If it is there, if it is clearly there, then I am not seeing it.

Dr. OAKS. I referred, in my statement, to the abortion provision. I will have the specific section for you in a moment. There the institutions are precluded from taking into consideration termination of pregnancy in decisions on employment, admissions, and the conduct of educational programs.

In answer to your question, I will give that as an example, but it is not the only one.

Mr. BLOUIN. Is that on page 11 of your testimony, sections 86.40 and 86.57?

I am trying to find the sheet that lists all the exemptions. "Section shall not apply to educational institution * * *" I think that the strong convictions of the Mormon religious are very well known, and very well respected by people of all faiths. I read this as an exemption for that potential religious conflict.

Dr. OAKS. I am referring specifically to sections 86.40 and 86.57 as including those provisions that mention abortion, and section 86.12 has the exemption provision. I referred to the fact, in my statement, that in order to claim the benefits of that provision one must go hat-in-hand to a Government administrator, to demonstrate what religious tenet supports the particular point of view.

I submit that this is demeaning and inconsistent with the Federal Constitution. The Supreme Court in several cases has held that it is not part of the business of Government to get into the business of religious belief or practice.

We believe that this is an interference with religious belief and practice, because in order to claim the exemption one has to go to the administrator. This is a good example of an area where the Government should stay out of regulation.

Anothera spect of this is the question of freedom of advocacy touching on free speech and association.

Mr. BLOUIN. Perhaps you could speak to that specific point as to how it might affect the religious principles of a private school.

Dr. OAKS. Let me give an example of an institution which is not affiliated with a religious organization, of which we have many in our organization. Some of these institutions feel just as strongly on an ethical basis about the subject of abortion as the religious institutions do.

They feel that it is unethical, and that a person who has been involved in the procuring or submitting to an abortion should not be part of the association of the organizational group.

This I submit is a question under the first amendment of the right of free association and speech. It is a forbidden area in the Constitution into which these department regulations have plunged because of their interference with the highly sensitive business of communicating ideals. This is not business, this is not employment, this is not even athletics. This is the heartland of the first amendment, the communication of ideals and advocacy in which a university and a college is intimately involved.

We have here the first step in what can prove to be a destroying of Government interference by regulation in that particular area in pursuit of a goal that many would deem laudable.

Without justification for the goal, the Government goes too far in this way in interfering with the business of private higher education.

Mr. BLOUIN. You are suggesting that private education without religious affiliation should be in receipt of Federal funds in such a manner as to have those funds, and the use of these funds in the structure of programs within that institution affect the other programs in the legal sense. That they would have their constitutional rights infringed on, perhaps, to live under this law.

Dr. OAKS. I suggest that if an institution is not receiving Federal funds directly, to subject them to this kind of——

Mr. BLOUIN. If they are not receiving Federal funds, they are not subject to the law.

Dr. OAKS. If you read the regulation carefully, you will see that an institution not receiving Federal funds directly, but enrolls a student who is receiving GI bill benefits, becomes subject to these regulations part and parcel. That is what I referred to as the indirect receipt of Federal funds, and I suggest that this is a violation of the authority placed in the congressional legislation, and it is a violation of the Constitution as well.

Mr. BLOUIN. I still tend to disagree with you. I am going to have to reread it again several times to even come close to that interpretation.

One other point that I would like you to respond to. Senator Birch Bayh was here yesterday, and he was one of the authors of the amendment 3 years ago, when it was passed in the Congress. He stated very clearly that in his opinion, as the author of that law, that the regulations are well within the intent of title IX. They did not, in his view, go outside of the boundaries of what Congress intended.

Dr. OAKS. We are bond to have differences of opinion even between the authors and proponents of the regulations. I understand that Congresswoman Edith Green said that in her opinion they go beyond it.

Mr. BLOUIN. We have not heard from Congresswoman Green. The only think that we have seen is a statement made several months after the pasage of that law. I suppose we have seen something in the testimony that specifically referred to or was a copy of the congressional report.

Dr. OAKS. I thought that you were referring to another statement that Senator Bayh made.

Mr. BLOUIN. He quoted directly from testimony or from actual statements made during the debate on the floor of the Senate 3 years ago, when that amendment and that bill was discussed. Mrs. Green may very well have made hers at a future date.

As one of the authors, he said that it was well within the intent——

Dr. OAKS. On page 14, there is a quotation made by Mrs. Green on the floor of the House, which expresses her opinion that this was not the intention.

Mr. BLOUIN. This was made 2 years after the bill was passed as opposed to on the floor during debate.

Our charge, as has been explained to us, is to try to decide, based on records that exist, based on testimony, on committee markups, in actual minutes of debate on the floor of the House and Senate, what the intent was, and whether or not HEW was beyond that intent.

I view it as being well within the intent. As I said, I am having a difficult time following some of the points you are making. I would appreciate, if you could get into it a little deeper than your statement does.

Mr. SIMON. Mr. Buchanan.

Mr. BUCHANAN. Thank you, Mr. Chairman.

Dr. Oaks, I have some constitutional hangups, too. For the first 6 years that I was a Member of Congress, I had a lousy voting record because I believe that it is unconstitutional for the Federal Government to provide funding to sectarian institutions in the first place, which was very much a minority view.

I feel that the Federal Government has neither responsibility nor authority to help finance the religious views or moral values of a particular religious group, such as the Baptists or the Mormons.

Dr. OAKS. I am here in three capacities: as an individual, as president of Brigham Young University, and spokesman for an association. I will try to answer that in my three capacities.

As an individual, and in my Brigham Young University capacities, my answer is, no, I don't feel that the Government has any such obligation. As a representative of my association, I prefer not to answer that.

You must recognize that we have diverse views in the association on that subject.

Mr. BUCHANAN. I agree with you, as I have already indicated.

Setting aside the student assistance in terms of veterans. I can understand how, if you say to a veteran, "Okay, you get the benefits, but you cannot go to Brigham Young or whatever," I can see that this may carry the concept of being a little too far outside the interpretation of the regulation.

Somehow, I have troube—on the one hand, we should take the position, I have never understood the courts not determining that assistance to a member, strengthens the body; and to strengthen the member, strengthens the body.

If I provide you money, or if the Government provides Stamford University money for any purpose, it releases money that that school may, then, use to propagate our Baptist faith. In that sense, we, taxpayers, Catholic taxpayers, Jewish taxpayers, and those who may behave constitutional power to do, but in fact I see in them an exgate our faiths.

Dr. OAKS. That is one of the major dilemmas of government relationship to the denominationally related institutions. There are two points to be made, Mr. Congressman, on that. The first point is that Congress has seen fit to provide, as you see at the top of page 4, that persons will not be denied the benefits or subjected to discrimination under any educational program, or any activity receiving Federal financial assistance.

Congress has, perhaps, by those words, gone, not as far as it would have Constitutional power to do, but in fact I see in them an expressed statutory limitation of the Federal control to the program or activity receiving financial assistance. This is program or activity, and not institution.

I submit to you that program or activity is subsumed in the institution. My institution has 100 programs or activities. When the Federal bill says that the prohibition relates to the program or activity receiving financial assistance, I submit to you that this is the limit of the Federal regulation that can be imposed upon that institution by the department.

Now, if the Congress saw fit to provide that any institution that receives any Federal financial assistance will comply with the following requirements, in all likelihood much of that regulation would be constitutional. But that is not what Congress has provided.

The question that understand to be before the committee is whether the regulations have gone beyond what Congress provided and intended. I take it that Congress intent appears more obviously from the statute than something in the legislative history.

The intent of the statute is "any education program or activity," and not any institution.

The second point is this. If it is the intention of the regulatory body, consistent with congressional intent, to deal with the problem that you have identified, that might be dealt with by what is called the maintenance of effort requirements. Where Federal assistance comes in on top of the athletic program, the chemistry department, or whatever it is, there is a maintenance of effort requirement that says that the institution, if it is going to get the Federal moneys, has to keep putting into its own budget an amount equal to what it is now putting in.

This keeps the institution from taking the money away from the chemistry department and putting it into the chapel, or some place else. That is the way to regulate and deal with this particular intent, short of imposing upon the entire institution the smothering mechanism of Federal control, which the title IX regulations do.

Mr. **Buchanan.** I am frankly relieved that your survey discloses that only 20 institutions, out of the 65 that you have heard from, receive Federal aid in excess of 20 percent.

In all candor, I said to this Committee, before I became a member of it, that I felt we were building a house upon the sand in rendering private education so dependent on Federal support, and so increasingly so, that the court decisions will be coming out stating that it is unconstitutional, that you cannot provide this kind of Federal area to sectarian institution.

The burden of my testimony is to preserve the alternatives so that the institutions that function without Federal assistance, and choose to do so, but under the regulations such an institution has to screen every student who enrolls to make sure that he is not on the GI Bill or receiving a loan through the local bank guaranteed through the Federal Government, or they will come in under the regulations, even though they are receiving nothing directly from the Federal government. That is one of the most offensive things about the regulation.

Mr. **Buchanan.** Thank you.

Mr. **Simon.** Mr. Hall.

Mr. **Hall.** No questions.

Mr. **Simon.** This is digressing from the thrust of your statement. You and our university was the largest private university. Are you larger than your alma mater, the University of Chicago, or Southern Methodist, or any of those schools?

Dr. Oaks. We have 25,000 full-time students at Brigham Young, which makes us the largest private university in the country in terms of fulltime enrollment. There is a number in the Northeast which are larger, if you count the enrollment in evening school.

We have a relatively small evening school program, but we have a 25,000 enrollment of full-time students.

Mr. Simon. I disagree with my friend, Mr. Buchanan, on the constitutional question because it seems to me there is a great variety of Federal assistance that is provided. My guess is that Samford and Brigham Young have foundations to which people donate money, and that money is tax exempt. So, you are receiving a Federal subsidy, a pretty substantial Federal subsidy.

Mr. Buchanan. This is a very difficult question. If you take the point of view that we should tax. If you mean a commercial enterprise, or if you mean moneys donated for the benefit of the university, to endow the university or support its life, I would only say that the other side of that constitutional question is, if you can tax, this might run into constitutional problems on the other side.

Dr. Oaks. I think the Supreme Court has given us the Constitutional doctrine on that. In *Walz* v. *Tax Commissioner*, the real estate case coming out of New York on that matter, it was contended that to make a real estate tax exemption to a religious institution was violating the necessary separation between church and state, because the church benefited from that real estate exemption.

The Supreme Court disagreed with the argument that you have mentioned. While I am not conversant with the specific language in the case, I think that it is a principle with Supreme Court authority to suggest that the fact that someone gets some indirect benefit out of a tax deduction does not subject that institution, church or otherwise, to Federal controls in the sense of the inhibition of the separation between the church and state.

I hope that that particular doctrine grows, because in that doctrine is the assured identity of private and religious organizations in our society, which have such an important position in our society.

Mr Buchanan. If the State can tax the church, does that not then imply a control of the church that goes beyond the prohibition?

Mr. Simon. I am not recommending that these taxes be established. I am simply suggesting that in that way, if I give $2,000 to Brigham Young University, and I get a $750 tax break in the process, there are substantial benefits, obviously, that private institutions receive.

First of all, just a very general statement, Mr. Oaks, and I say this with due respect because I have heard things about you from your colleagues at the University of Chicago and elsewhere.

As I read over this, it is not too hard to go back 20 years and take the same statement—look at it tonight—take the same statement and substitute "race" for "sex," and you are kind of going through the same arguments again.

Secondly, I am not sure I buy your legal thesis, but I am concerned about the practical implications. I also agree that, somehow, this violates something fundamental if Brigham Young University, Samford University, or St. Francis Xavier, have to go to someone at HEW to say: "There are our religious tenets, therefore . . ." that kind of thing, which we have to be sensitive to.

I would be very much interested in your sending to the members of the committee, or to me anyway, your suggestions as to how these rules should be modified. Ideally, I understand that you would like us to say that we are simply going to reject them. My vote, frankly, cannot be in the direction of rejection.

I am willing to make modifications, which are practical. I don't want rules that are impractical. I would be very much interested in your suggestions as to how we could make progress in this Nation, how we can continue to push Brigham Young University, Samford University, and all the other schools in their station, but at the same time not create unmanagable problems for you.

Dr. Oaks. We will be pleased to undertake to do that, and we will communicate with the committee through our counsel.

[Supplemental material from Wilkinson, Cragun and Barker.]

Wilkinson, Cragun & Barker,
Law Offices,
Washington, D.C., June 27, 1975.

Re HEW Regulations Concerning Non-discrimination On The Basis Of Sex In Education Programs And Activities Receiving Or Benefiting From Federal Financial Assistance.

Hon. James G. O'Hara,
Chairman, Postsecondary Educational Subcommittee,
House and Committee on Education and Labor,
Washington, D.C.

Dear Mr. O'Hara: On June 24, 1975, Dr. Dallin H. Oaks, President of Brigham Young University, Provo, Utah, and Secretary and a member of the Board of Directors of AAPICU, testified before the Postsecondary Education Subcommittee of the House Education and Labor Committee. During the questioning of Dr. Oaks by members of the Subcommittee, a question was raised with respect to Section 86.12 of the HEW Regulations which would require a religious educational institution seeking to claim the exemption provided for such institutions in Title IX to carry the burden of proving to the Director of Civil Rights at HEW that such religious tentes relied on by the institution are bonafide. Thus, as is stated in page 12 of Dr. Oak's statement, a government agency becomes "the final arbiter of religious worship, practice and belief."

Mr. Simon and Mr. Blouin requested that we suggest an alternative to the regulation that would not violate the Constitution and still carry out the intent of Congress with respect to non-discrimination against a person on the basis of sex. On behalf of Dr. Oaks and the Association, we would recommend that Section 86.12 be amended to read as follows:

> This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

The language above is identical to Subsection (a) of the present regulation. It is also the exact language of the exemption as it appears in Title IX. We suggest that Subsection (b) be deleted in its entirety.

The result of the regulation as amended would be a restatement of the statutory intent of Congress. Thus, if a claim of discrimination is lodged against an educational institution controlled by a religious organization, an action can be brought in court to determine the validity of any exemption claimed by the educational institution under the Subsection of Title IX and the regulation. This would eliminate any interference by the Executive Branch in religious matters and place the responsibility for determination of whether the regulation and the statute has been violated in the hands of the Federal Courts traditionally embued with this responsibility.

Because this recommendation was discussed more fully at page 23 of the comments filed with HEW on behalf of AAPICU, we respectfully request that this letter and the entire comments transmitted herewith be included in the printed record.

Sincerely,

Wilkinson, Cragun & Barker,
By Gordon C. Coffman.

Dr. **Oaks**. On the question of race and sex, I thought that I had met that issue head on in my statement, on the top of page 15, when I acknowledged, or advocated the fact that race and sex stand on an entirely different constitutional footing.

I made a distinction between *Brown* v. *the Board of Education*. I don't want anyone to have any doubts on that score. We are not trying to warm up some old discredited arguments that were tendered to justify racial segregation. This is a different matter, altogether different, as one sees in considerable detail in my statement, and all of my discussions addressed to the religious and ethical questions of which abortion was given as an example, are to illustrate that there is quite a different relationship between these principles and legal arguments on the question of segregation of the sexes.

On the question of the difference between segregation on the basis of race, and segregation on the basis of sex, I submit that Congress has bought that particular argument. Again, as pages 10 and 11 of my statement will show, and as the regulations themselves concede, while Congress prohibits any segregation on the basis of race it extended to institutions the right to have separate accommodations for men and women, toilet facilities, locker room and shower facilities, et cetera, as long as they pass the inspection by HEW.

Mr. **Blouin**. I have one more question. Specifically, with the enforcement power of this bill, it seems to me the only penalty for loss of Federal funds directly to the institution has been pretty well assumed by all those who have been before the subcommittee that this does not include cutting off specific assistance under the GI bill.

So, the easiest way to avoid any problem within the context of this law, is don't take any Federal monies.

Second, with regard to the question on page 3 of your testimony, you refer to regulations imposing unproven social theories on educational institutions, endangering the diversity of thought and action that have been the strength of American higher education.

What are the unproven social theories that you are referring to, in terms of the rules that are before us?

Dr. **Oaks**. For one example are the unproven social theories that education is promoted more effectively in coeducational institutions than in single-sex educational institutions. I happen to preside over a coeducational university, and I believe that this is the best way to educate people, but I do object to having that judgment made by HEW, and imposed upon single-sex institutions across the country, whether they are undergraduate or graduate institutions.

I think that this is an unproven social theory, and we should have the institutions free to pursue that particular theory and still have students enrolled in those institutions, supported by the GI bill, be they male or female.

Mr. **Blouin**. The regulations only apply to coeducational institutions, though. Strictly male or strictly female institutions are exempt.

Dr. **Oaks**. It is not the case that strictly male and strictly female institutions are given a short period of time to phase out their operations. Then, doesn't my contention apply to those institutions?

Mr. **Blouin**. Graduate programs?

Dr. **Oaks**. I said, be they graduate or undergraduate.

Mr. **Blouin**. Can you give me an example of an institution that has strictly a single-sex graduate program?

Dr. **Oaks**. I am sure that I can give you examples, but I don't have one in mind right now. I am sure that there are single-sex institutions that have graduate programs, that have been ordered to phase out.

Mr. **Blouin**. They are not of a religious nature.

Dr. **Oaks**. I am less positive when you make that exception, but I think that there are institutions, single-sex institutions, with a master's program, for example, that have been given a short time to phase out their graduate program, and account to HEW for the admission policies and the graduate aspect of their institution.

I fail to see any justification, to answer your question, for that particular mandate from the Department, and I fail to see any justification for it in the acts of Congress.

Mr. **Blouin**. I want to make it clear, as I said earlier, that I see nothing in here that infringes upon religious freedom in terms of educational institutions. If I felt it did, if I felt it promoted something that I had some real problem with, I would have a different approach to the entire set of rules and regulations before us.

I firmly believe that there is nothing in here that was written into law previously, which was not written in the Constitution, in terms of guarantees of equal rights within this country.

If you can give us some specific examples, I would love to see them, and you might just win a convert.

Mr. **Buchanan**. You have answered my question previously in your three capacities, and I am now going to ask you to answer the question as a taxpayer, as a citizen and a taxpayer. Do you feel that we, in the Congress have the right and responsibility to pursue the use of your tax dollars in the programs in which they fall, to make certain that they are not used for unlawful purposes by the recipient of those funds?

Do you feel that we have the right and the responsibility to see to it that the executive branch, which administers the law, does this?

Dr. **Oaks**. Yes, I do, Congressman. I think that Congress has the responsibility to pursue the objective that your question implies.

Surely, Congress has the responsibility to insure that tax dollars are not spent contrary to the law. The Congress has the responsibility to tailor its regulatory laws and to supervise the executive branch so that it will tailor its regulatory laws, so that they are diverse in their application according to the sensitivity of the particular subject being involved.

If you had a piece of legislation that affected how newspapers would be conducted, or how radio stations would be conducted, I would suggest that the Congress would be especially sensitive about the extent of its regulatory authority over that, because of the sensitivity of the first amendment. I suggest that the same principle applies to education.

Mr. **Buchanan**. We don't regulate.

Dr. **Oaks**. You do regulate radio stations, and I would suggest that the Communications Act reveals that sensitivity, and so do the antitrust laws with respect to their application to newspapers.

Mr. **Buchanan**. As a member of the Congress, it is my feeling that where Federal dollars flow, Federal control will and must follow, or else Congress, and those who administer the programs, can be charged with irresponsible handling of other people's money.

Dr. OAKS. I agree with that proposition.

Mr. SIMON. Dr. Oaks, we thank you, your counsel, and particularly your excellent Congressman, who has taken the time to be with you here today.

Dr. OAKS. Thank you.

Mr. SIMON. Our next witness is Carolyn Polowy, associate counsel and associate secretary of the American Association of University Professors.

STATEMENT OF CAROLYN I. POLOWY, ESQ., ASSOCIATE COUNSEL AND ASSOCIATE SECRETARY, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Ms. POLOWY. Mr. Chairman and members of the Subcommittee: My name is Carolyn I. Polowy, and I am Associate Counsel and Associate Secretary for the American Association of University Professors.

It is my pleasure, on behalf of the association to comment on the final title IX regulations prepared by the Department of HEW, to implement title IX of the 1972 Education Amendments.

I am accompanied today by Dr. Alfred D. Sumberg, Director of Governmental Relations, who is also an associate secretary for the American Association of University Professors.

We are providing copies of our testimony, and I will simply summarize the principal points in support of the regulations, and then perhaps we can have some time for questions.

Mr. SIMON. We will enter your statement in the record at this point.

[Prepared statement referred to follows:]

PREPARED STATEMENT OF CAROLYN I. POLOWY, ESQ., ASSOCIATE COUNSEL AND ASSOCIATE SECRETARY OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

Mr. Chairman and members of the Subcommittee on Postsecondary Education. My name is Carolyn I. Polowy and I am Associate Counsel and Associate Secretary for the American Association of University Professors. I am here today with my colleague, Dr. Alfred Sumberg, who is also an Associate Secretary for the American Association of University Professors. It is my pleasure, on behalf of the Association to comment on the final regulations prepared by the Department of Health, Education and Welfare to implement Title IX of the 1972 Education Amendments. Our comments will relate primarily to higher-education and will highlight certain portions of the regulations which affect academic employment.

At the outset, let me state that academic women breathed a sigh of relief when the final Title IX regulations were released by Secretary Weinberger on June 3, 1975. The lengthy and unnecessarily prolonged process by which the regulations were drafted and redrafted has caused a substantial delay in enforcement of Title IX, thus permitting the continuation of sex discrimination in many educational programs and activities which are receiving or benefitting from federal financial assistance. It is the students whose lives are being shaped by our educational institutions who stand to lose the most from protracted delays since they have very few viable avenues of redress for education-related sex discrimination complaints other than Title IX.

The Title IX regulations adopted by HEW [illegible] scheduled to take effect on July 21, 1975, prior to the opening of a new school year. We urge that appropriate training programs begin so that HEW regional employees will finally be able promptly and efficiently to conduct compliance reviews and process outstanding complaints. We would also call your attention to the fact that other federal agencies which provide funds for educational programs or to education institutions must also, under the language of Title IX, adopt appropriate regulations to implement the nondiscrimination provisions of Title IX.[1] The National Science Foundation has reported[2] that in 1971 fourteen separate federal agencies[3] provided 3.48 billion dollars to approximately 2,368 institutions of higher education. We would suggest that while various adaptations may have to be made by the other thirteen federal agencies which must adopt regulations to implement Title IX, the now-published HEW regulations should provide the minimum standard for other agencies to follow.

Let me begin, however by stating that, in general, we support the Title IX regulations as finally issued. While the regulations may be the result of compromise, and thus weaker in sections than some would wish and more demanding in parts than others would desire, we believe that the overall impact of the regulations will be positive in opening educational opportunities to all persons regardless of sex. It is our position that Congress should not interfere with the implementation of the regulations and that the promise of nondiscrimination embodied in Title IX should be permitted to become an integral part of American education.

The Regulations should be given an opportunity to work. Whatever flaws may exist in the Title IX regulations will become more concrete after education institutions subject to Title IX have completed the self-evaluation required by Section 86.3 of the Regulations. We would urge that institutions prepare the self-evaluation as a cooperative effort with the assistance and guidance of faculty and student representatives. Until the self-evaluation has been completed, the feasibility and cost of institutional compliance with the regulations will remain guesswork.

In their final form, the Title IX regulations place emphasis on the resolution of sex discrimination complaints within an institution. The AAUP has long favored such an approach as a concomitant characteristic of responsible institutional self-governance.[4] We are, therefore, pleased to note that in Section 86.8 (b), the Regulations require institutional recipients to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" cognizable under the Regulations. In keeping with our concern that education institutions articulate sound and judicious regulations and grievance procedures, the Association will continue to lend assistance to faculty members and administrators who are seeking information about appropriate grievance procedures for higher education institutions.

The AAUP considers it particularly prudent that, in the Employment section of the Regulations, in most respects HEW has chosen to conform the Title IX regulations with the Sex Discrimination Guidelines of Title VII of the 1964 Civil Rights Act and in the area of pay or compensation, with the requirements of the Equal Pay Act. Because we have been working particularly hard to establish the right of academic women to equal pension benefits, we were disappointed that the regulations did not require institutions to provide equal monthly pension benefits to male and female employees. However, Secretary Weinberger announced on June 3, 1975, in a press release which accompanied distribution of the regulations, that "The President has directed the Equal Employment Opportunity Coordinating Council to study this issue further, in consultation with HEW, and to report back to him by October 15th." This study is expected to guide the federal agencies toward a uniform policy and we strongly urge adoption of a policy requiring the payment of equal monthly pension benefits to male and female employees. We have detailed our reasons in support of equal pension benefits in recent letters to President Ford and to Secretary of Labor, John Dunlop; in our comments submitted to HEW on proposed Title IX regulations; and in a paper co-authored by Committee W Chairperson, Dr. Mary Gray, and Committee W member, Dr. Barbara Bergman. I am submitting these documents with our testimony to further amplify the Association's position on the pension benefits issues. (Exhibit A)

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[1] Section 902 of Public Law 92–318 provides that: "Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the rovisions of . . . [the anti-sex discrimination provisions] . . . section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken."

[2] *Federal Support To Universities, Colleges and Selected Nonprofit Institutions, Fiscal Year 1971 (December, 1972).*

[3] Including: Departments of Agriculture, Defense, Commerce, Housing and Urban Development, Interior, Labor, Transportation, Health, Education and Welfare; Atomic Energy Commission, Office of Economic Opportunity, Environmental Protection Agency, Agency For International Development, National Aeronautics and Space Administration, and the National Science Foundation.

[4] See, e.g., "1966 Statement On Government of Colleges and Universities," and "19[illegible] Recommended Institutional Regulations on Academic Freedom and Tenure," reprinted in *AAUP Policy Documents and Reports.*

The portion of Title IX Regulations (Section 86.57(c))) which deals with the treatment of pregnancy for employment purposes does follow Title VII Guidelines in requiring that pregnancy related illnesses be treated as temporary disabilities for the purpose of leave, disability income, and for the accrual of other benefits or services. We believe that the Title VII Guidelines have given substantial protection to those women who wish to have children while pursuing careers. Many education institutions have revised their employment policies to provide medical, hospitalization, and disability insurance which covers pregnancy and pregnancy-related illnesses. It would have been most unfortunate if Title IX Regulations had decreased these obligations and we note with satisfaction that the Title IX regulations complement Title VII Guidelines.

There is indeed an urgency in moving forward to implement the Title IX regulations. Students, who are to be the principal beneficiaries of Title IX and the implementing Regulations, should not be required to wait any longer for equal education opportunity without regard to sex. We believe that many institutions are ready to carry out in good faith the requirement and spirit of Title IX and we, therefore, urge Congress to permit full implementation of the regulations.

We shall be happy to respond to any questions you may have concerning the Association's position on the Title IX Regulations.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Washington, D.C., May 27, 1975.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR PRESIDENT FORD: You currently have on your desk a final draft of regulations prepared by the Department of Health, Education and Welfare to implement Title IX of the 1972 Education Amendments. I want to call to your attention a matter of concern to members of the American Association of University Professors which is addressed in the regulations.

As presently written, the Title IX regulations permit employers subject to Title IX requirements to either pay equal contributions on behalf of all employees or to provide pension plans which pay equal benefits to similarly situated male and female employees.[1] Many higher education institutions now provide pension plans which pay unequal monthly benefits based on sex and, therefore, the final language of Title IX regulations will have a substantial impact on the question of whether or not academic women will continue to receive reduced pension benefits because of their sex.

The American Association of University Professors has stated its support for efforts "to implement the principles of equal monthly retirement benefits for women and men faculty." The resolve of the AAUP is significant because faculty members and higher education institutions which participate in Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF) pension programs are the principle groups to be affected by regulations which require the payment of equal pension benefits regardless of sex. In keeping with the policy of the AAUP, Committee W on the Status of Women in the Academic Profession has presented testimony to the Department of Labor in support of equal pension benefits (September 10, 1974). A copy of this testimony is attached. In addition, the written comments of Committee W on proposed Title IX regulations strenuously supported the requirement of equal pension benefits for men and women. (Comments enclosed)

In view of the advancement in legal thought and the significant shift in our national policies since the passage of the Equal Pay Act in 1963 and the 1964 Civil Rights Act, disparate employment benefits should no longer be tolerated when related to sex-based or other prohibited classifications rather than to neutral employment factors.

At least one state retirement program providing unequal monthly retirement benefits for men and women has been held unconstitutional. (See *Robertson v.*

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[1] Draft Regulations, Subpart E. Sec. 86.56(2).

Reilly, case No. 4098, Vanderburg Circuit Court, Indiana.) As you are aware, the Equal Employment Opportunity Commission has mandated equal pension benefits under Title VII of the 1964 Civil Rights Act. In the Commission's "Guidelines on Discrimination Because of Sex", the cost of providing equal benefits is not considered to be a relevant rationale for refusing provision of equal benefits. Recently, the EEOC's interpretation received judicial approval in *Manhart* v. *City of Los Angeles*, 9 EPD 6911, (C.D. Cal, 1975).

The lack of a clear Administration stand requiring equal pension benefits weakens enforcement efforts of the EEOC, creates unnecessary confusion about the purpose of equal employment laws, and permits some employers and insurers to profit from the lack of federal agreement to the detriment of female employees, a substantial majority of whom will never live to collect the full measure of benefits to which they are entitled. Surely, coordination of federal activity in this area would take a leap forward if Title IX regulations at least mirrored the language of the EEOC guidelines.

We believe that no substantial reasons have been advanced to support the concept of unequal pension benefits. Testimony of the insurance industry at the Labor Department's hearings in September established that a substantial number of employers provide pension plans which pay equal pension benefits to similarly situated men and women. Large employers such as the federal government have long provided equal pension benefits for their employees while maintaining the actuarial soundness of their programs.

Certainly, federal legislation which has as its purpose the elimination of unlawful and arbitrary sex discrimination should be interpreted in a way which will effectuate the legislative intent. Permitting employers subject to Title IX to provide discriminatory pension plans hardly carries forward the mandate of Title IX. I hope that in your careful review of Title IX regulations, you will correct the suggested language to require equal treatment of women and men in the area of pension benefits.

Sincerely,

JOSEPH DUFFEY.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Washington, D.C., May 6, 1975.

Mr. JOHN DUNLOP
Secretary of Labor, Department of Labor, Washington, D.C.

DEAR SECRETARY DUNLOP: I want to call to your attention a matter of concern to members of the American Association of University Professors which is currently under study by the Department of Labor. I refer to the question of whether or not academic women will continue to receive reduced pension benefits because of their sex.

At the outset, it is important to note the American Association of University Professors, a predominantly male membership organization, has pledged its efforts "to take action to implement the principle of equal monthly retirement benefits for women and men faculty." The resolve of the AAUP is significant because faculty members and higher education institutions which participate in Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF) pension programs are the principal groups to be affected by a change in Labor Department regulations. In keeping with the policy of the AAUP, Committee W on the Status of Women in the Academic Profession has presented testimony to the Department of Labor in support of a change in the Department's regulations to require the payment of equal pension benefits (September 10, 1974). A copy of this testimony is attached.

In view of the advancement in legal thought and the significant shift in our national policies since the passage of the Equal Pay Act in 1963 and the Civil Rights Act of 1964, disparate employment benefits should no longer be tolerated when related to sex-based or other prohibited classifications rather than to neutral employment factors.

At least one state retirement program providing unequal monthly retirement benefits for men and women was found unconstitutional. (See *Robertson* v. *Reilly*, Case No. 4098, Vanderburgh Circuit Court, Indiana.) As you are aware, The Equal Employment Opportunity Commission has mandated equal pension benefits under Title VII of the 1964 Civil Rights Act. In the Commission's "Guidelines On Discrimination Because of Sex", the cost of providing equal benefits is not considered to be a relevant rationale for refusing provision of equal benefits. Recently, the EEOC's interpretation received judicial approval in *Manhart v. City of Los Angeles*, 9 EPD 6911, (C.D. Cal, 1975).[1] The Court in *Manhart* implied that the Department of Labor could not permit a differentiation based on sex-segregated actuarial tables and still comply with the language of the Equal Pay Act.

The failure of the Labor Department to take a stand requiring equal pension benefits weakens enforcement efforts of the EEOC, creates unnecessary confusion about the purpose of equal employment laws, and permits some employers and insurers to profit from the lack of federal agreement to the detriment of female employees, a substantial majority of whom will never live to collect the full measure of benefits to which they are entitled. Secretary Weinberger, in a letter to President Ford accompanying the revised draft of regulations recently sent to the White House, indicated that the treatment of pension benefits by the Department of Health, Education and Welfare under Title IX of the 1972 Educational Amendments is being complicated by the fact that no uniform regulations exist in the federal arena.

We believe that no substantial reasons have been advanced to support the concept of unequal pension benefits. Testimony of the insurance industry before the Labor Department established that a substantial number of employers provide pension plans which pay equal pension benefits to similarly situated men and women. Large employers such as the federal government have long provided equal pension benefits for their employees while maintaining the actuarial soundness of their programs. The time has come for the Department of Labor, through its regulations, to support the rights of female employees to enjoy the full measure of their employment benefits by requiring employers to provide plans which pay equal pension benefits for men and women.

Sincerely,

JOSEPH DUFFEY.

Enclosure.

EQUITY IN RETIREMENT BENEFITS

(By Barbara Bergmann[2] and Mary Gray[3])

A great principle which has emerged from the anti-sex-discrimination legislation is that it is no longer permissible for an employer to treat any particular woman as if she were "the average woman." The employer is no longer permitted to assume that any particular woman can lift no more than the "average woman" can lift, or assume she will stay on the job as long as the "average woman" will stay, or assume that once on the job she will produce as much as the "average woman." Grouping people by sex when making decisions as to hiring, promotion, pay, or any other personnel action constitutes unlawful discrimination. An employer who wants to hire someone who will have to lift heavy objects is free to give all persons who apply a lifting test, but that employer is not free under the law to make the hiring decision on the basis of the conformation of the sex organs of the applicants. The fact of life which the law recognizes is that all men are not, for purposes of work, different from all women; that there is a distribution of talents and propensities among men and another distribution of talents and propensities among women, and that these distributions, although not identical, do overlap. The "average" of the male distribution may be different than the "average" of the female distribution, but there are individuals in one distribution who have equivalent talents and propensities to individuals in the other distribution.

As it is with talents and propensities, so it is with death ages. While the "average woman" dies later than the "average man," there is a considerable overlap in the distribution of death ages. If at a single point in time we were to pick at random 1000 men age 65 and 1000 women age 65, and follow them through and observe their death ages, we would find an overlap of 84 percent (see Figure 1). This means that we could match up 84 percent of the men with 84 percent of the women as having an identical year of death. This leaves 8 percent of the population, namely 8 percent of the men who die relatively early, unmatched by women's deaths, and 8 percent of the women who die relatively late, whose deaths are unmatched by male deaths.

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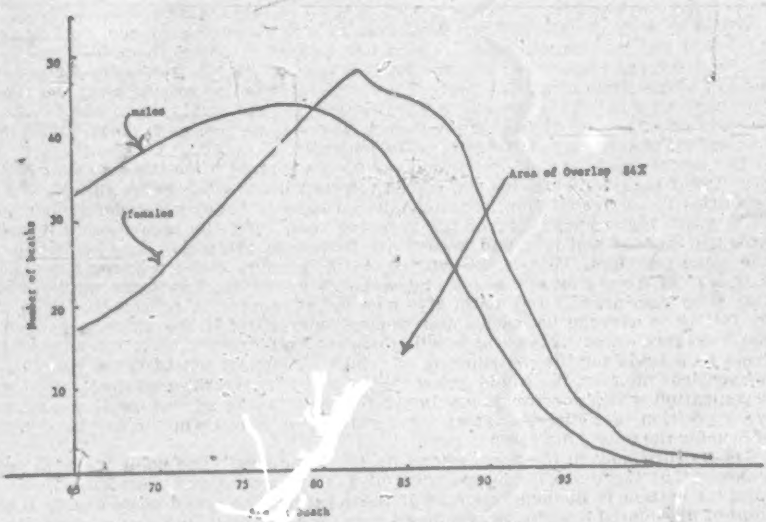
[1] In *Manhart*, the Court held: "Because the Department of Water and Power's practice in question here violates these considerations by applying the general actuarial characteristics of female longevity to individual female employees who in reality may or may not outlive individual male employees, the Court decides that plaintiffs have established a case of discrimination under 703(a)(1) of the Equal Employment Act." (9 EPD at 6914).

[2] Barbara Bergmann, Economics—University of Maryland, is a member of national Committee W.

[3] Mary Gray, Mathematics and Statistics, American University, is Chairperson of national Committee W.

Distribution of Death Ages of 1000 White Males and 1000 White Females who reach Age 65



Source: U.S. Life Tables, 1959-61

Allowing employers to provide higher pension benefits for men than for women on the grounds of higher cost is to allow employers to assume that all men are like the "average man" and all women are like the "average woman" in terms of death age. It allows employers to arrange things so that the savings in annuity cost for the 8 percent of the population consisting of excess men who die early are entirely monopolized by men, 84 percent of whom are in the overlap group. The extra burdens imposed by the higher annuity costs of 8 percent of the population consisting of excess women who die late are entirely allocated by employers to women, 84 percent of whom are in the overlap group. This is "because" the conformation of the sex organs of women match those of the excess people who die late. What is at issue is whether it is within the law and whether it is just to continue using the word "because" in this way in this context. We would argue that the law, which forbids using sex as a way of grouping employees, requires the sharing of these benefits and these costs over both sexes. Pension plans which group employees by sex deny equal pay for equal work to the majority of the population which is in the overlap group.

The women in the large overlap group with lower pensions are, to say the least, in an unfortunate position. The considerable difference in their living standard is not even compensated for by the dubious utility of a longer life; they do not cost the system any more than men do; their only crime is that they have the same sex organs as the few people in the longer-lived group. This seems a slender reason to condemn them to a considerably meaner living standard than men. Public policy embodied in the anti-discrimination legislation requires that the burden of supporting the 8 percent of the population who are longer lived be shared by the entire population, rather than putting the whole burden on the 42 percent of the population who are like the long lived group in sex organs but not in longevity.

Some employers, including many universities and colleges, purchase annuities for their employees from insurance companies rather than making pension payments directly. There are many ways these insurance companies might arrange their charges. They might (and for some purposes do) group men and women together, and, after consideration of the characteristics of the group they are insuring, charge an equal amount for each employee and promise to deliver equal monthly pension benefits to each. However, most private insurers will oblige the employer by offering to give the women employees less in terms of monthly benefits. This obliges the employer because it lowers the price the employer has to pay per employee from what it would be if all employees got the same benefit. As long as it is permissible for employers to seek to purchase such a package they will find insurance companies who will be glad to oblige them. The cost is lowered for the employer, and the "buck is passed" to the insurance company to do the discriminating. The pretext is the greater dollar cost of servicing the "average woman." This pretext is illegitimate for the employer to use in the context of salary, or hiring, or promotion. There is no reason to permit its use in the field of pensions or fringe benefits generally.

The use of pensions as a discriminatory device is quite when one considers the practice of many universities and colleges in treating death benefits and pension annuities in an inconsistent manner. In the case of benefits for death before retirement, higher mortality of the "average man" and the higher costs it entails are ignored and men and women are frequently given the same benefit for the same premium. That is, in figuring death benefits, men are given the "advantage" of averaging out men's and women's mortality. The same university may then turn around and again give men the advantage in retirement benefits by *failing* to average out men's and women's mortality. If the university (and the insurance organization which sells them the policy) were truly interested in costs as a basis for the distribution of fringe benefits, it would not act in this inconsistent manner. We would assert that what the university and the insurance organization which services it are interested in is taking advantage of women's weak position in a discriminatory labor market to deny them the full measure of benefits the university gives to men.

Let us turn now to the issue of "actuarial soundness." The point we wish to make is that there are numerous ways of achieving actuarial soundness." Certainly a system is financially sound if the total of discounted costs equals the total of discounted benefits, plus some margin for administration, deviations from past experience, etc. This may be achieved by splitting up the population for rate-making purposes into many small groups or into a few big groups, or keeping the entire population in one group. For example, it would be actuarially sound to split up the population into different rate-paying groups, the assignment of individuals to groups depending not only on sex but on race, geographic location, blood pressure, number of cigarettes smoked in previous years, number of relatives dead of cancer, and the like. Or it would be equally sound actuarially for the law to mandate keeping the whole population in one group and charging each the average cost of servicing the entire population.

Retirement systems can operate under equal benefit schemes—most state retirement schemes do, the Federal retirement system does and with all its other defects, Social Security pays men and women with identical work histories the same benefits. Similarly, retirement systems can operate without sex classification in their actuarial tables. The tables can be adjusted for many different groupings, or for no grouping at all.

Supporters of the status quo worry that institutions whose insured population is overwhelmingly male would pull out of existing plans were their rate to be based on sharing the risk uniformly and would go to companies who insure only groups which are almost exclusively male and which could therefore offer lower rates for the same retirement benefits. This is unlikely for several reasons. First of all, companies could not legally offer insurance only to predominantly single-sex groups so if male groups moved to a company, female groups would follow and eventually equalize the rates; secondly, one would hope that an eventually less sexually stereotyped work force would eliminate the potential for sex-based insurance pools to be formed. Finally in the college and university retirement business one company is so firmly entrenched that the prospect of temporarily lowered rates would not cause any significant shifts away from it.

Much has been made of the alleged conflict in existing agency interpretations. In fact, however any retirement plan which meets the requirements for equal pension benefits set out in Guidelines developed by the Equal Employment Opportunity Commission for enforcement of Title VII of the 1964 Civil Rights Act meets the requirements of the Labor Department and the Department of Health, Education and Welfare for equal benefits or equal contributions. Moreover, if any of these agencies change their regulations to require both equal benefits and equal contributions, any plan meeting such a test will also meet EEOC's. That is, conformance with the strongest conditions implies conformance with the weaker.

One final issue which deserves comment is the complications arising from various options within retirement plans—single-life, joint-life, 10-year certain, etc. Under existing retirement plans which have these various options the substantial sex-differentials exist only in the single life option. However, under the grouping of men and women together for the sharing of risks, the payment rates on all options would be the same for similarly situated men and women since neither the employees nor their spouses would be identified by sex.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
Washington, D.C., October 14, 1974.

Re Comments on Title IX Regulations.

Hon. CASPAR WEINBERGER,
Secretary, Department of Health, Education and Welfare,
Washington, D.C.

DEAR SECRETARY WEINBERGER: On behalf of the Association's Committee W on the Status of Women in the Academic Profession, we respectfully submit the following comments on the proposed regulations (45 CFR Part 86) to implement Title IX of the 1972 Education Amendments (20 U.S.C. 1681 *et seq.*). While we encourage prompt and vigorous enforcement of Title IX by the Office of Civil Rights, it is our belief that the greatest progress toward the elimination of sex discrimination in educational institutions can be made where institutons voluntarily commit themselves to the principle of equal opportunity embodied in Title IX. Those institutions which have developed fair and equal policies will be little affected by Title IX enforcement. Others will have to devote the necessary time and energy to developing programs and policies which reflect non-sexist principles. We believe that much human potential will be released in opening educational opportunities and employment to females.

Our comments focus on an application of Title IX to higher education institutions, not because of any sense that sex discrimination does not exist in elementary and secondary schools, but rather because women in higher education are our particular constituency and concern. We have no doubt, however, that eradication of discrimination at the lower educational levels is a prerequisite for full realization of the potential of women in postsecondary schools. Because Committee W has paid particular attention to the economic problems of women employed in academe, a substantial part of our comments will discuss the employment portions of Title IX regulations.

Sections 86.2 (m), (n)

The definitions do not cover admission to private undergraduate vocational and/or professional training programs. We feel that this is particularly unfortunate as it allows institutions to continue to limit admission of women in such programs as engineering and architecture, thus permitting the perpetuation of male dominance of these professions. If the "pool" of qualified women in these traditionally male-dominated fields is to be substantially increased, greater efforts must be made to train women for careers in these fields. If public institutions are to be principally responsible for this task, they should be generally favored in the award of federal contracts, grants and other forms of financial assistance and more particularly, public higher education institutions should be awarded special funds for the development of undergraduate programs for the training of women in professions and fields which now have fewer than 25 percent women employed in the field.

Section 86.2(p)

After the words "education program or activity," we suggest adding the words "course or field of study," so that all discrimination in admissions is prohibited.

Section 86.2(s)

We suggest the addition of a section defining the term "party" as any individual, or group initiating or filing a complaint of sex discrimination under Title IX, or an institution or person named as a respondent in such a complaint. The absence of a clear statement of *who* is a party in a Title IX proceeding severely limits the due process rights of complainants and possibly of respondents as well.

Section 86.6(b)

It must be made clear that state or local laws concerning employment at educational institutions are superseded by Title IX. This is most easily accomplished by adding "employee" or "applicant for employment" wherever "student" appears in 86.6(b).

Section 86.8

We suggest adding to this section an obligation for the recipient to publicize to students and parents the name of the person who shall coordinate Title IX activities.

Section 86.21(c) (4)

We suggest adding to this subsection a statement which prohibits an institution's use of a test for the purposes of admissions which requires information concerning marital status. We believe that such questions have a discriminatory impact on women and serve no useful purpose for testing. For example, in the application forms for the Law School Admissions Test, the Admission Test for Graduate Study in Business and the Graduate Record Exam, all administered by the Educational Testing Service, Princeton, New Jersey, the sex of the candidate is asked. Moreover, in the first two exams, answers as to marital status and/or marital intentions are required. We do not see that this information is necessary for either the testing or admissions processes.

Section 86.31(b), 86.31(b) (7), 86.31(c) (2)

There is a whole area of support of discriminatory organizations which needs to be covered more thoroughly by the Title IX regulations. Federally-assisted institutions should be prohibited from assisting *in any way* organizations that discriminate, regardless of whether or not the realtionship of the organization to the institution is "substantial" or whether or not the organization provides services to students and employees.

Section 86.35(c) (2)

The regulations are commendable in dealing with discrimination in financial aid as far as they go. However, we feel that programs such as Rhodes Scholarships cannot be excluded from coverage. The influence and prestige of Rhodes Scholars is enormous. Women cannot continue to be excluded from the program if doors to advancement in professional life are to be truly open. If minorities were excluded, the Rhodes Scholarship program would be in violation of Title VI and we believe there would be little equivocation on this point. Institutions which administer or particiapte in the Rhodes program are clearly in violation of the plain language of Title IX, and the regulations should reflect this reality. Moreover, we do not ask HEW to interfere with a foreign trust. We simply ask that American schools which receive federal funds not be permitted to participate in programs which discriminate against 51% of the population of the U.S.

Section 86.35(d)

The section is wholly inadequate in establishing a requirement that athletic scholarships be provided for both men and women. No such requirement is found in the section on athletics either. Thus, women may continue to be excluded from a type of valuable financial assistance and from serious participation in athletics. Some type of formula could be used to provide a share of athletic scholarships proportionate to the number of women participating in athletics or to the number of women in the institution if women have been traditionally barred from athletics at the institution.

Sections 86.35(d), 86.38(c) (1) and (2), (d), (e), (f)

The whole area of athletics is not adequately covered by the regulations. Some provisions are good and should be retained, e.g., the interest survey. However, institutions should be required to do a self-analysis and formulate a written affirmative action plan if remedial action is required to overcome the effects of past discrimination.

The regulations on notification should require that all students be notified in writing concerning the availability of athletic opportunities. To formulate exact regulations to insure equal opportunity is difficult. However, as a minimum there should be separate teams with no differences in equipment, facilities, scholarships or support activities. Section 86.38(f) should be changed to read, "nothing in the regulations should be interpreted as prohibiting equal aggregate expenditures for each sex," and the regulations should require a per-participant expenditure which is equal for similar teams.

Section 86.45(c)

This section should incorporate language stating that for the purposes of Title IX, the term "bona fide occupational qualification" shall have the same meaning as that given it under Title VII of the 1964 Civil Rights Act as amended.

Section 86.46(a)

First, this section should be clarified by simply eliminating a portion of the last sentence, the words "not subject to the provisions of 86.44." Fringe benefits are a part of the compensation package, but they deserve special treatment since various pension and hospitalization plans have been criticized because they treat men and women differently for the purpose of benefits and coverage. In view of the fact that Section 86.46 clarifies a recipient's obligation in regard to fringe benefits and is much more clearly stated that Section 86.44 (compensation), we urge the separation of fringe benefits from compensation for the purpose of the regulations.

Section 86.46(b)(2)

Now we address an issue of special concern to the Committee on the Status of Women of the AAUP, that of equal monthly retirement benefits for women and men.

On April 27, 1974 at the Annual Meeting of the American Association of University Professors, an organization predominantly male in membership, the following motion was passed by a vote of 164 to 69:

> "That the Sixtieth Annual Meeting of the AAUP direct the Council (of AAUP) promptly to take action to implement the principle of equal monthly retirement benefits for women and men faculty."

We offer our comments on the proposed guidelines in furtherance of the action mandated by that motion.

Some employers, including a substantial number of colleges and universities, are providing greater pension benefits for retired men employees than for retired women employees with equivalent work histories, forcing retired women into a lower standard of living as a result. This practice has been rationalized by reference to the greater costs due to the greater average longevity of women and to "actuarial soundness." We take the position that allowing such practices to continue is to permit discrimination which the Congress outlawed in Title VII of the Civil Rights Act, in the Equal Pay Act, and in Title IX of the Education Amendments of 1972. It is our position that average greater longevity of women does not justify allowing employers to provide a lower standard of living for elderly retired women than elderly retired men, and that "actuarial soundness" can be achieved by other entirely feasible arrangements, arrangements which do not violate our sense of justice and the anti-discrimination laws of our country.

A great principle which has emerged from the anti-discrimination legislation is that it is no longer permissible for an employer to treat any particular woman as if she were "the average woman." The employer is no longer permitted to assume that any particular woman can lift no more than the "average woman" can lift, or assume she will stay on the job as long as the "average woman" will stay, or assume that once on the job she will produce as much as the "average woman." Grouping people by sex when making decisions as to hiring, promotion, pay, or any other personnel action constitutes unlawful discrimination. An employer who wants to hire someone who will have to lift heavy objects is free to give all persons who apply a lifting test, but that employer is not free under the law to make the hiring decision on the basis of the conformation of the sex organs of the applicants. The fact of life which the law recognizes is that all men are not, for purposes of work, different from all women; that there is a distribution of talents and propensities among men and another distribution of talents and propensities among women, and that these distributions, although not identical, do overlap. The "average" of the male distribution may be different than the "average" of the female distribution, but there are individuals in one distribution who have equivalent talents and propensities to individuals in the other distribution.

As it is with talents and propensities, so it is with death ages. While the "average woman" dies later than the "average man," there is considerable overlap in the distributions of death ages. If at a single point in time we were to pick at random 1000 men age 65 and 1000 women age 65, and follow them through and observe their death ages, we would find an overlap of 68.1 percent (see Appendix 1). This means that we could match up 68 percent of the men with 68 percent of the women as having an identical year of death. This leaves 32 percent of the population, of whom 16 percent are men who die relatively early, unmatched by women's death, and of whom 16 percent are women who die relatively late, whose deaths are unmatched by male deaths.

Allowing employers to provide higher pension benefits for men than for women on the ground of higher cost is to allow employers to assume that all men are like the "average man" and all women are like the "average woman" in terms of death age. It allows employers to arrange things so that the savings in annuity cost for the 16 percent of the population consisting of excess men who die early are entirely monopolized by men, 68 percent of whom are in the overlap group. The extra burdens imposed by the higher annuity costs of 16 percent of the population consisting of excess women who die late are entirely allocated by employers to women, 68 percent of whom are in the overlap group who die earlier. This is "because" the conformation of the sex organs of men match those of the excess people who die early, and the sex organs of women match those in the excess people who die late. What is at issue is whether it is within the law to continue using the word "because" in this way in this context. We would argue that the law, which forbids using sex as a way of grouping employees, requires the sharing of these benefits and these costs over both sexes. Pension plans which group employees by sex constitute a denial of equal pay for equal work for the majority of the population which is in the overlap group.

The women in the large overlap group with lower pensions are, to say the least, in an unfortunate position. The considerable difference in their living standard is not even compensated for by the dubious utility of a longer life; they do not cost the system any more than men do; their only crime is that they have the same sex organs as the few people in the longer-lived group. This seems a slender reason to condemn them to a considerably meaner living standard than men. Public policy embodied in the anti-discrimination legislation requires that the burden of supporting the 16 percent of the population who are longer lived be shared by the entire population, rather than putting the whole burden on the 34 percent of the population who are like the long-lived group in sex organs but not in longevity.

Some employers, including many universities and colleges, purchase annuities for their employees from insurance companies rather than making pension payments directly. There are many ways these insurance companies might arrange their charges. They might (and for some purposes do) group men and women together, and, after consideration of the characteristics of the group they are insuring, charge an equal amount for each employee and promise to deliver equal monthly pension benefits to each. However, most private insurers will oblige the employer by offering to give the women employees less in terms of monthly benefits. This obliges the employer because it lowers the price the employer has to pay per employee from what it would be if all employees got the same benefit. As long as it is permissible for employers to seek to purchase such a package they will find insurance companies who will be glad to oblige them. The cost is lowered for the employer, and the buck is passed to the insurance company to do the discriminating. The pretext is the greater dollar cost of servicing the "average woman." This pretext is illegitimate for the employer to use in the context of salary, or hiring or promotion. There is no reason to permit its use in the field of pensions or fringe benefits generally.

Does the fact that the pension may be purchased, rather than being provided directly by the employer, alter the employer's obligation under the law not to treat each woman as the "average woman?" If it did, then, by the same logic, employers might contract out the provision of many other fringe benefits to firms who would charge the employer the same per employee regardless of sex, yet provide lower benefits to the woman on the pretext of higher average cost of servicing the women. Even the payment of wages might be contracted out in this way, and differences justified by reference to different "costs." There is no end to the possible ingenuity of employers in maintaining differences in compensation to men and women if employers were permitted to escape the mandate of the anti-discrimination laws by passing the buck. An employer who purchases the provision of fringe benefits from outside organizations which provide unequal benefits by sex is discriminating as much as if he provided unequal benefits directly.

The use of pensions as a discriminatory device is made crystal clear by the practice of many universities and colleges in treating death benefits and pension annuities in an inconsistent manner. In the case of benefits for death before retirement, higher mortality of the "average man" and the high costs it entails are ignored and men and women are frequently given the same benefit. In figuring death benefits, men are frequently given the "advantage" of averaging out men's and women's mortality. The same university may then turn around and again give men the advantage in retirement benefits by failing to average out men's and women's mortality. If the university (and the insurance organization which sells it the policy) were truly interested in costs as a basis for the distribution of fringe benefits, it would not act in this inconsistent manner. We would assert that the university and the insurance organization which services it knowingly or unknowingly take advantage of women's weak position in a discriminatory labor market to deny them the full measure of benefits the university gives to men. To lay down guidelines which would countenance this kind of behavior under the anti-discrimination laws would be to make a mockery of those laws.

Let us turn now to the issue of "actuarial soundness." The point we wish to make is that there are numerous ways of achieving "actuarial soundness." Certainly a system is financially sound if the total of discounted costs equal the total of discounted benefits, plus some margin for administration, deviations from past experience, etc. This may be achieved by splitting up the population for rate-making purposes into many small groups or into a few big groups, or keeping the entire population in one group. For example, it would be actuarially sound to split up the population into different rate-paying groups, the assignment of individuals to groups depending on blood pressure, numbers of cigarettes smoked in previous years, number of relatives dead of cancer, and the like. Or it would be equally sound actuarially for the law to mandate keeping the whole population in one group and charging each the average cost of servicing the entire population.

Which division of the population for insurance purposes, if any, should be encouraged by public policy? There are some forms of group-splitting which encourage desirable behavior and which are reasonably protected by public policy. Charging owners of frame houses more than owners of brick houses for fire insurance encourages the choice of safer building material. Charging accident-prone drivers higher auto insurance premiums encourages safer driving. Charging older people more for term life insurance than younger people encourages younger people, whose need for insurance is greater, to purchase adequate amounts. But there is no desirable behavior which is encouraged by splitting up the population by sex and charging more for annuities for women than for men, and therefore no public interest in allowing such a split. On the contrary, splitting the population by sex for pension purposes is a device for allowing emloyers to discriminate against women, which is against public policy.

We have outlawed discrimination in hiring, promotion and in wages and salaries. To allow the continuation of discrimination in the delivery of fringe benefits through lower penson benefits for women would be to enshrine for no discernible reason the last vestige of a discriminatory system. We therefore recommend the adoption of language which requires equal pension benefits for men and women and we strongly urge that this be accomplished by requiring equal contributions for men and women. Currently an employer in compliance with EEOC requirements for equal monthly benefits is not in violation of the weaker regulations of other agencies which require either equal monthly benefits or equal contributions. If Title IX guidelines require equal monthly benefits and equal contributions, employers in compliance with them will also be in compliance with Title VII regulations. Therefore Committee W recommends that the Title IX regulations require both equal contributions *and* equal monthly benefits.

Section 86.47

There are several regulations regarding pregnancy which we feel are discriminatory:

86.47 (e) (1)

While the regulations require that an employee cannot be forced to begin pregnancy leave if here physician certifies that she is able to work, they also provide that she notify her employer 120 days prior to the expected date of delivery. Such notification is not required for any other medical problem which entails a fairly predictable hospitalization period or leave of absence. Pregnancy is being singled out for special treatment which is likely to have a harmful impact on women and the regulation is, thus, discriminatory. Therefore, we again state that pregnancy should be treated like any other temporary disability with no special leave provisions. See our statement on *Leaves of Absence for Child-bearing, Child-rearing, and Family Emergencies*, a copy of which is attached as Appendix B.

86.47(e)(2)

The requirement that the woman's fitness to work be certified in writing by a physician may treat pregnancy differently from other temporary disabilities, in violation of Title VII guidelines. Either it should be dropped or such certification should be required only if an institution also requires it for all temporary dsabilities.

86.47(e)(2)

The regulations allow institutions to force a woman who takes a leave for pregnancy or childbirth to remain on leave until the beginning of the first full academic term following certification that she is able to work. This could require a woman who takes one day off for childbirth in September to remain off until the following September if her institution defines academic term as the whole year. This discrimination provision should be deleted. Women should be allowed to take exactly the number of days leave which they require for pregnancy related disabilities as they and men are for any other temporary disabilities.

In general, we would suggest the adoption of the AAUP statement on *Leaves of Absence for Child-bearing, Child-rearing and Family Emergencies*, which is incorporated as a part of these comments. We would also urge the inclusion under this section of an anti-nepotism policy. We suggest consideration of the AAUP statement on *Faculty Appointment and Family Relationship*, which is attached as Appendix C.

86.41(a)(1)

We feel that the proposed regulations should require an employer to offer prorated fringe benefits for part-time employees who desire fringe benefits. Women have had particular difficulty in obtaining appropriate health and pension insurance when they teach in a part-time status. Thus, even if a woman teaches for her principal income, she may be classified as a part-time teacher by an institution and thus lose an opportunity to elect pension and health insurance coverage. We, therefore, urge that this inequity be alleviated by requiring institutions to offer benefit programs to part-time employees.

SUBPART F—PROCEDURES

Sections 86.61–86.66

We urge the prompt issuance of complete procedural regulations. Ideally, a uniform set of procedures would be established for enforcement of Title IX, Title VI, the Executive Orders and the Public Health Services Act. The development of a single investigation manual and uniform fund termination procedures would facilitate joint enforcement of anti-discrimination statutes and regulations and add credibility to OCR's over-all enforcement efforts. Title IX could be combined with the Executive Order and Title VI reviews and Public Health Service Act investigations. Because personnel resources are limited, economy requires consolidation of investigatory and compliance proceedings. We also urge the adoption of the investigatory procedures of the National Labor Relations Act which are now also used under Title VII of the 1964 Civil Rights Act.

Under Section 86.62, individuals or their representatives may file complaints with the Office of Civil Rights for alleged violations of Title IX. However, individuals or their representatives are not accorded the simple due process right to participate as a party in all agency proceedings including a hearing if one is ordered. If either an individual or class of persons has a stake in the outcome of the proceeding, their participation as a party should be guaranteed. It is insufficient to a person injured by discrimination to be accorded only the right to participate *amicus curiae* in a Title IX proceeding.

We also require the adoption of timetables or time targets for investigations of complainst and compliance reviews. There are no time limits for investigations, issuance of letter of findings, or commencement of hearings. We are thus concerned about realistic enforcement. We already know of cases where Title IX complaints, filed two years ago, have not been investigated to completion.

Finally, we urge the prompt issuance of final regulations and strict interim enforcement of *prima facie* cases of sex discrimination in educational institutions receiving federal financial assistance.

Respectfully submitted.

DR. MARY GRAY,
Chairperson, Committee W.
CAROLYN I. POLOWY,
Associate Counsel, Associate Secretary.

At the outset, let me state that academic women breathed a sigh of relief when the final title IX regulations were released by Secretary Weinberger. An awful lot of time and hope have been put into the process of getting regulations out and get title IX finally implemented.

We are hoping that not only will the title IX regulations become effective, as presently written, on July 21, 1975, but that the other 13 Federal agencies, which provide substantial Federal assistance to educational programs and activities, will either adopt the HEW regulations or draft their own regulations which are in keeping with the HEW regulations.

Let me begin by saying that in general we support the title IX regulations as finally issued. I think that it has been pointed out today that the regulations are very much the result of compromise, and virtually anyone who would look at the regulations would disagree with portions, and would feel that other portions would be strengthened.

It is our position, however, the Congress should not interfere with the implementation of the regulations on July 21, and that the promise of nondiscrimination embodied in the title IX regulations should be permitted to become an integral part of the American educational system.

First of all, we feel that the self-evaluation process, which is embodied in the regulations, and which you have alluded to today, will give educational institutions an ideal opportunity to find out whether or not the regulations are unrealistic.

I think an awful lot of the complaints that you hear at present are guesswork and not the result of analysis of the regulations based on educational policies and programs. I feel that the institutions should prepare with faculty and with students the self-evaluation that is required.

After that self-evaluation is prepared, there will be a working knowledge of what the regulations actually require.

The second aspect of the regulations which the Association finds particularly pleasing is the provision which requires grievance procedures. The American Association of University Professors has for many years encouraged higher education institutions to engage in responsible self-government. Responsible self-government, we feel, is the drafting and promulgation of fair and judicious institutional regulations on grievance procedures.

We feel that the emphasis on the solution of discrimination problems within an institution is a healthy focus of the regulation. We hope that the combination of self-evaluation and the development of grievance procedures will actually set the stage for carrying out the obligations that are established under the title IX regulations.

We have been particularly interested in the employment aspect of the regulations. While we were disappointed that the regulations did not provide for payment of equal periodic pension benefits to men and women, it is our understanding that based on an announcement by Secretary Weinberger on June 3, that the Federal Government will be seeking a uniform regulation in the area of fringe benefits.

It is our hope that a coordination of Federal effort will, in fact, result in the promulgation of a regulation which requires payment of equal periodic benefits to women and men. This particular issue has a high impact on academic women, who have, for many years, in many institutions, received unequal pension benefits.

We were pleased to see that the employment regulations follow title VII. We think that this is a healthy aspect.

One of the complaints in the area of civil rights is that regulations are not being enforced, or the procedures are not uniform. We feel that the Secretary's and the President's leaning toward adoption of title VII employment policies is very appropriate.

In particular, the maternity benefits sections are reinforced, and are a very important part of the title VII regulations which have benefited many academic women.

I think that this sums up the areas that we touch on in our comments. I would like to close by saying that there is, indeed, an urgency in moving forward to implement the title IX regulations. Students who are to be the principal beneficiaries of title IX and implementing regulations should not be required to wait any longer for equal opportunity without regard to sex.

We believe that many institutions are ready to carry out the requirements and spirit of title IX. We, therefore, urge Congress to permit full implementation of the regulations. We hope that the implementation will begin July 21.

Mr. SIMON. Mr. Buchanan.

Mr. BUCHANAN. Thank you, Mr. Chairman.

I want to compliment you on your statement. You are aware of the testimony of NCAA and the coaches concerning their concern for the effect of the implementation of these regulations in college athletic programs. I wonder if you would have any response to that basic situation?

I also wonder how, on the scale of values, you would place that.

Ms. POLOWY. In terms of priority, we really feel that opening educational programs to members of a sex which have previously been discriminated against in this program, will probably have the greatest impact as far as social development.

I am not belittling the impact of the athletic regulations or their effect. I think that if the title IX really encompasses much more than athletics, and we have been talking about the approach that the athletic groups have been taking, in fact what they are saying is that they have a business to preserve not an educational program. That is not the way that we look at the issues that are involved.

We are talking about educational programs, and if athletics are a part of a good educational program, we hope that they will be available to both sexes.

Dr. SUNBERG. I would like to speak to that. In many universities there is a conflict between faculty and athletic extracurricular programs, and intercollegiate athletic programs. In many institutions, faculties have recommended the elimination of deficit producing intercollegiate sports programs and for a very obvious reason.

As deficits grow in educational institutions, some priorities have to be established. One of the priorities, and one of the major priorities, obviously, is the academic program. Therefore, if the deficit is a result of the intercollegiate program, then, obviously, that does not contribute to the academic program.

We are concerned about it. We recognize that the university needs a very comprehensive program in order to remain viable. Some universities have been able to establish good intercollegiate athletic programs, but these programs now must reflect the problem of sex discrimination, and must reflect upon that program in such a way as to eliminate it.

Mr. BUCHANAN. Thank you very much.

Mr. SIMON. One final question.

This is the same question that I directed to two earlier witnesses. What would be the impact, do you think, on the universities if Congress were to reject the title IX regulations?

Ms. POLOWY. There has been substantial debate about the adequacy of the present civil rights laws, and the discrimination programs. I think that there is substantial concern that enforcement is not adequate, or fair, or uniform.

I think that what we would be facing would be an abdication of the confirmation of the social policy, which I thought Congress really did confirm when the 1972 Educational Amendments were passed.

Second, we would simply be reinforcing what is now becoming a very cynical view toward enforcement of civil rights laws. I think that it would be the death knell of a realistic and viable enforcement program.

I think that a piecemeal implementation of the regulations is also dangerous. I think that there is time to read, and to hold oversight hearings, but in this respect the regulations have not been implemented—a viable set of regulations has not been implemented. After the institutions complete a 1-year self-evaluation, if it is done in a proper and adequate fashion with the input of faculty and students, I think that this would be the time for oversight hearings, to determine whether or not the regulations are unreasonable, or whether in certain aspects they are inadequate, or too stringent. I would say, at this point, that it would be a blow to academic women.

I think that most people have become used to the idea that title IX regulations are now in force, and will, in fact, be effectuated on July 21.

Mr. SIMON. Thank you very much, Ms. Polowy and Mr. Sunberg.

This completes our hearing for today, and we will meet again at 9 o'clock tomorrow, when the hearing will resume in room 2257.

[Whereupon, at 4 p.m., the subcommittee adjourned, to reconvene at 9 a.m., Wednesday, June 25, 1975, in room 2257.]

SEX DISCRIMINATION REGULATIONS

WEDNESDAY, JUNE 25, 1975

House of Representatives,
Subcommittee on Postsecondary Education,
Committee on Education and Labor.
Washington, D.C.

The subcommittee met at 8:30 a.m., pursuant to recess, in room 2175, Rayburn House Office Building, Hon. Tim Hall presiding.

Members present: Representatives O'Hara, Blouin, Simon, Mottl, Hall, Quie, Eshleman, and Bell.

Staff present: Jim Harrison, staff director; Elnora Teets, clerk and Richard Mosse, minority assistant counsel.

Mr. Hall. We will come to order.

Since we have quite a bit of testimony we ought to get started, hoping that some of the other members get here before long.

Ms. Raffel, I wonder if we could start with you.

Ms. Raffel. Yes, Mr. Chairman.

Mr. Hall. Let me say before you start, I note some of the testimony is rather bulky and all of the testimony will be included in the record. If some one of you want to condense your testimony without reading, that is up to you.

Feel free to present your testimony any way you want to.

STATEMENT OF NORMA RAFFEL, HEAD, EDUCATION COMMITTEE, WOMEN'S EQUITY ACTION LEAGUE (WEAL)

Ms. Raffel. I would also like to just read parts of it in the interest of time. I would like to attach the testimony of Margaret Dunkle before the Fairfax County Human Rights Commission, "Ten Myths That Limit Sports Opportunities for Girls."

Mr. Hall. Very well, that will be inserted in the record.

[The documents referred to follow:]

Prepared Statement of Norma Raffel, Head, Education Committee, Women's Equity Action League (WEAL)

I am Dr. Norma Raffel, Head of the Education Committee of the Women's Equity Action League (WEAL). WEAL is a national voluntary organization which promotes equality in education and employment through legislation, litigation, and by pressing for full enforcement of anti-discrimination laws on behalf of women. Also, I am a Commissioner on the Pennsylvania Commission for Women and represent it on the Pennsylvania Department of Education's Task Force to eliminate sexism from the schools.

In 1972 when I was national president of WEAL, Congress passed Title IX of the Education Amendments which prohibits discrimination because of sex in educational programs or activities that receive Federal financial assistance. This law affects nearly every educational institution in the country and promises, if enforced, to assure girls and women the same opportunities that their male counterparts have enjoyed in the area of education. Title IX was enacted because there was a clear need for such legislation. Hearings had been held which revealed pervasive sex discrimination in all aspects of educational programs and activities including admissions, treatment of students and employment practices. For two years women waited, sometimes impatiently, for HEW's Office for Civil Rights to develop regulations so the law could be enforced. Finally, in June 1974 the proposed regulations were published in the Federal Register and comment was invited. After reviewing nearly 10,000 comments, HEW made some changes and President Ford signed the regulations last month. Since then Congress has 45 days during which it can take no action and allow the regulations to become effective on July 21, 1975 or vote disapproval which may return them to HEW for further changes.

Now, three years after Title IX was enacted there is real hope that HEW will have regulations so the law can finally be enforced. It became obvious as the regulations were being developed that eliminating sex discrimination from educational institutions was a large, complicated undertaking—mainly because the discrimination was so pervasive and had gone unrecognized for so long.

Eliminating discrimination because of sex in education will mean changing time-worn established practices to conform with the legal requirement of nondiscrimination. Quite naturally many groups and persons that have enjoyed or benefited by the preference given to males in the past will object to the application of the law, question its intent or scope and attempt to delay equal opportunity in education.

It is up to us now to look calmly and clearly at the intent of Congress and the law and to allow these regulations which provide a reasonable framework to carry out the nondiscrimination principles of Title IX to become effective so that enforcement can proceed.

There are two areas which seem to be of major concern and I should like to briefly comment on them. They are the scope of coverage and athletics.

Scope of title IX coverage.—There is some controversy over whether Title IX prohibits discrimination in all of the educational programs and activities of an educational institution or just those programs and activities directly receiving Federal financial assistance. Crucial to resolving this problem is the interpretation of the phrase "education program or activity" found in Section 901 of Title IX.

Also in question is Section 902 which deals with the scope of HEW's termination authority. Can HEW terminate all Federal financial assistance received by an educational institution which is found to be in violation of the law, only that financial assistance which goes directly to a specific program which discriminates, or can HEW terminate funds to any program which is affected by the overall discrimination in the institution.

Two excellent legal memoranda, one from the American Law Division of the Library of Congress and the other from the Center for National Policy Review at the Catholic University of America's School of Law address the interpretation of Sections 901 and 902. They discuss the similarity between Sections 901 and 902 and Title VI of the Civil Rights Act of 1964. Because almost identical statutory language is used, it seems clear that Title IX would provide the same kind of coverage as Title VI and that the interpretation of Title VI should be a guide for the interpretation of Title IX.

Title VI has been interpreted as prohibiting racial discrimination in all aspects of the educational program in a school district receiving Federal aid. Therefore, in Title IX the term "education program" should also be interpreted in its broadest sense—to encompass the entire education program offered by an educational institution receiving Federal financial assistance.

Title IX was legislated to "provide equal access to men and women to the educational process and the extracurricular activities of the school: (117 Cong. Rec. 30407) by prohibiting discrimination in employment, admissions with certain exceptions, and in access to the programs and activities of the institution.

The intent of Congress would be defeated by anything but a broad interpretation. A narrow interpretation—that the law prohibits discrimination only in programs directly receiving Federal aid would be virtually impossible to enforce.

Federal money in many cases simply can not be traced down to a specific program. Federal revenue sharing funds permeate educational institutions providing direct and indirect aid to all educational programs including athletics. The Commissioner of Basic Education in Pennsylvania said that it was impossible to trace revenue sharing funds and he had to work on the assumption that all educational institutions in the state received some.

If the money could be traced and only programs receiving direct aid were prohibited from discriminating, enforcement would be difficult, if not impossible. For example, Federal money is used to buy a piece of school equipment. Would every class using that particular piece of equipment be obliged not to discriminate while adjacent classes not using the equipment be allowed to discriminate? Suppose the class used the equipment one semester and not the other. Could they discriminate one semester, but not the other? Imagine the kind of enforcement and record-keeping involved in such a situation!

Many programs not directly receiving Federal monies benefit indirectly from Federal assistance given to institutions for construction programs, development of programs and student aid. Money released because of Federal funding may be reallocated. For example, a school district receives a grant to develop an individual, flexible course of study in high school. Part of teachers and administrative salaries involved in that project could be recaptured and returned to the general funds or be diverted to other programs.

Congress in Section 901 provided a broad general prohibition against sex discrimination in education and then limited its scope by exempting certain institutions from the admission requirement—one aspect of the total program. If Congress had intended the scope of Section 901 to be limited, there would be no need to mention the admission exemptions.

Section 902 of Title IX deals with the scope of authority in terminating funds. Again, the same language is used in this section as in Title VI. In the court case of the Board of Public Instruction of Taylor County, Florida v Finch, 44 F 2d (5th Cir. 1969) interpreted Title VI to mean that funds should be cut off to programs directly receiving Federal aid and any other part of the total program which is "infected" by discrimination. The concept of "infection" is discussed in the legal memoranda I mentioned earlier. This concept is as relevant to sex discrimination as it is to race discrimination.

Thus we have in section 901 a general prohibition of sex discrimination and in section 902 a narrowing of the fund termination to those areas where discrimination has affected the program or activity. Any other interpretation would make equal opportunity for girls and women almost impossible to achieve under Title IX.

Athletics.—No other area of the Title IX regulations have provoked as much comment, discussion, publicity, and emotion as the section which pertains to athletics. One sports commentator said that Title IX is the biggest thing to hit athletics since the invention of the whistle. That will indeed be true if it results in first class citizenship for women in athletics. In no other area of the educatitonal program has the progress toward equal opportunity been more difficult and the inequities more apparent than in interscholastic and intercollegiate athletics.

WEAL has conducted studies of interscholastic sports programs in several states and found that girls programs were grossly underfunded, girls could use the facilities only when not needed or wanted by boys, and there was little inclination to change the situation.

For example: A survey of Pennsylvania, excluding Philadelphia, revealed that 50% of the secondary schools (junior and senior high schools) offered no interscholastic sports programs for girls. In those that did, there was an average of 7 sports offered for boys each year compared to 2.5 for girls. There were no interscholastic programs for girls in the junior high schools although the average junior high school offered 4 interscholastic sports for boys during the year.

A detailed study of one school district in a middle class university community revealed that ten times as much money was spent on the boys as on the girls programs, $74,874 for boys athletics and $7,704 for girls. The junior high schools in that area did not allow girls to use the gyms after school at all because they were used for boys programs. Only when it was pointed out that the school district was in probable violation of the law was any progress made. Girls in Pennsylvania certainly wanted more opportunities. The assistant to the Secretary of Education wrote as early as 1972, "We have been swamped with complaints about girls' lack of access to athletic programs, facilities, equipment and teams."

A study of sex discrimination in the Waco Independent School District in Texas revealed that $250,000 was allocated annually for boys athletics in the junior and senior high schools. The girls program was allocated $970—four tenths of one percent of the boys. Girls were prohibited use of stadiums, athletic fields, equipment and gymnasiums. No interscholastic, intercity or intramural girls' teams were permitted in Waco. An athletic committee was appointed by the school boad to recommend changes in athletic policies. They recommended and received approval for an expansion of the boys' programs with an estimated increase of $154,000 annually for that program and no allotment for a girls' athletic program! The need and desire for a girls' program was demonstrated by public protests by several parents' groups and the attempt to organize informally some girls' basketball teams at the junior high level.

The American public has supported athletic programs because it is convinced such activities help develop sound minds and bodies. Yet, half of the students—girls and women—are largely excluded. They are deprived the benefits of active sports participation including the opportunity to establish life-time habits of exercise which promote an increased level of good health in adult life.

If participation in competitive sports programs are as beneficial to women as they are to men, why has there been such difficulty in increasing opportunities for woman in this area? In large part the answer lies in a statement from the NCAA to collegiate athletic directors.

"Finally hammer the impossibility of meeting the requirement of overall program equity for men and women without severe curtailment of men's programs which you have built carefully over the years . . ."

It appears that the NCAA is as opposed to the law itself which requires equity as it is opposed to the regulations which determine how equity is to be achieved.

Those of us who have worked directly with school administrators have often heard the same thought. "We can't take anything from the boy's program and there's no money to develop one for girls." Of course, when boys have had virtually all of the money and facilities, sharing will be difficult. Going from preferential treatment to equal treatment will be something of a shock. However, this may be an appropriate time for educational institutions to reassess their total athletic program taking into account the goals of education as well as the interests and needs of *all* of its students.

It is highly unlikely that women's competitive sports programs will approach the expenditures that the men's programs now enjoy. Equal expenditures for male and female programs are not required by the regulations, only that those females who have an interest be given an equal opportunity at their ability level.

Money is one of the major obstacles in approving the athletic section of the regulations. Therefore, it is important to remember that most of the money now supporting men's sports in colleges and universities throughout the country come from either student activities fees or the educational dollar. According to the March 15, 1974 New York Times, only one athletic department in ten makes a profit. The other nine run at a deficit.

According to the NCAA, the annual deficit of its members in conducting intercollegiate athletic programs in 1974 was $49.5 million dollars. That fact, more than equal opportunity, may "destroy intercollegiate athletics as we have known it".

The NCAA advocates that if all else fails, at least exempt revenue from revenue-producing sports from the requirements of Title IX. Certainly this would be one way to ensure the perpetuation of the *status quo*.

If an institution were one of the few fortunate ones which makes a profit in a sport such as basketball, it could, with such an exemption, award up to about 18 scholarships plus monthly allowances for players, provide recruiting expenses, tutoring and training meals for the team. Awards such as rings, jackets or blankets could be given to players. They could fly the team, bands, families and others to games. Equipment and facilities would be limited only by the amount of profit. Any extravagant expenditure directly or in-directly related to the sport would be allowed. All of this could be done, not because it builds sounder minds and bodies, but because the sport earns money. In contrast, the women's basketball team continues to operate in the same old way—often with no scholarships, certainly no monthly allowances, no recruiting expenses, no tutoring for training meals. Busing would be provided as well as limited equipment and training facilities. The difference is the women's team doesn't earn a profit.

Supporting an exemption for intercollegiate athletic programs because they earn money seems to say that when dollars come in, principle goes out!

Congress has already dealt with this aspect of the regulations. Senator Tower introduced an amendment to the Education Amendments of 1974 specifically exempting revenue-producing intercollegiate athletics from Title IX. It passed the Senate, but was deleted by conference committee and was replaced by the "Javits Amendment" calling for reasonable regulations governing intercollegiate athletics.

Achieving equal opportunity for women in sports has been further complicated by the differing physiology of women and men. That there are differences we are certain, but if, when and how much those differences should affect the participation of men and women in competitive athletics is not so certain. Research on the physiology of women in sports is relatively recent and many questions are still unanswered. Cultural attitudes and physiological factors have not yet been thoroughly separated. We are entering a largely untested area. There are many different predictions about the best way to achieve equal opportunity in athletics. Experience and measurable results will identify those programs which are most effective. The courts have given some direction and in general the regulations are compatible with those decisions. The flexibility allowed in the regulations regarding mixed and single-sex competitive athletics may be prudent at this stage.

WEAL believes that, taken as a whole, the Title IX regulations provide a reasonable framework within which Title IX can be implemented and urge that Congress allow these regulations to become effective in July. Then the long overdue and much needed enforcement can begin.

More than 100 years ago at a conference in Pennsylvania, women called for equal educational opportunities for their daughters—a goal not yet achieved. The Title IX regulations will be a giant step toward that goal!

TESTIMONY OF MARGARET C. DUNKLE FOR THE WOMEN'S EQUITY ACTION LEAGUE (WEAL)

TEN MYTHS THAT LIMIT SPORTS OPPORTUNITIES FOR GIRLS

My name is Margaret C. Dunkle and I am testifying on behalf of the Women's Equity Action League (WEAL). I chair the WEAL Youth Sports Subcommittee. I am also Associate Director of the Project on the Status and Education of Women of the Association of American Colleges, Director of the newly formed National Institute for Women in Sport, and a member of the Committee to Study Restructuring Intercollegiate Athletics for Women of the Association for Intercollegiate Athletics for Women (AIAW).[1] In these various capacities I have authored a number of articles on equal opportunity for women, primarily for women students and employees. Several of these articles which relate to equal opportunity in athletic programs are attached.

The Women's Equity Action League (WEAL) is a national organization founded in 1968. Its purposes are to promote greater economic progress on the part of American women and to seek solutions to economic, educational and legal problems affecting women.

We—all of us—have often blindly accepted a number of myths which have led us to tolerate and even encourage practices and programs which give our girls less of a sporting chance than our boys. We now have a unique opportunity to reassess the validity of our assumptions and to make new decisions—decisions designed to offer our girls (as well as our boys) the best and fullest and most challenging opportunities. For these reasons, WEAL favors mixed teams for preadolescents athletic activities.[2]

Although we are specifically addressing sports opportunities, the implications of today's discussion for equal opportunity for girls and boys go far beyond the athletic arena. Athletic competition is a powerful socializing agent in our society: to limit the athletic opportunities of girls is to limit their other options as well. Many of the same attitudes that lead people to belittle and scoff at female athletes also lead them to discount girls who aspire to other "nontraditional" fields—from business executive to college professor to physician to attorney. So even girls and women who have no interest in sports for themselves have a stake in seeing that those who want to play basketball (or even football) get the best chance possible.

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[1] I am testifying today solely as a representative of the Women's Equity Action League (WEAL).

[2] This testimony is specifically addressing the issue of preadolescent mixed teams, not the somewhat more complex issues of mixed sports participation for older children and adults (where significant physiological differences may be a factor).

Since the 1954 Supreme Court decision in *Brown* v. *Board of Education of Topeka*,[3] we have had to take a new and more stringent look at the "separate-but equal" principle with regard to racial discrimination. So, too, are we now taking a new and more stringent look at the "separate-but-equal" principle with regard to discrimination based on sex. More and more people now accept the contention that only the most compelling reasons can ever justify "separate-but-equal" (or its corollary "freedom of choice") treatment based on sex. The situation we are discussing today—mixed sports for preadolescent children—does not meet these criteria for allowing "separate-but-equal."

I would like to address some of the major reasons that are most often cited for having sex segregated teams or sports programs—and look into how they stand up under scrutiny for sports programs for preadolescents. So, let us now address the 10 major myths that limit sports opportunities for girls.

Myth No. 1. Girls will get hurt more if they compete with boys

The admittedly scant valid data on sports injuries between preadolescent girls and boys *do not* support the assumption that female children are more likely to get hurt if they compete with male children. Overall in fact, the injury rate per participant is lower for girls than boys.[4]

Additionally, injuries are more likely to occur when big children compete against little children, regardless of their sex. Similarly, injuries are more likely to occur when big children, regardless of their sex, compete against one another (because bigger, stronger children are more likely to be able to have sufficient strength to cause a blow sufficient in force to cause a fracture).[5]

Since preadolescent girls and boys are just about the same size (indeed, many of these girls are bigger than the boys), the girls are no more likely to get hurt than equally trained boys. In fact, an eight-year-old girl is probably more likely to be hurt by competing against an eleven-year-old girl (who is probably considerably bigger than she is) than by competing against an eight-year-old boy (who is probably about the same size she is).

If injury is our primary concern, then, it would serve our purposes to divide preadolescent teams by such factors as age, height or weight—not sex.

Myth No. 2. It's not good for girls to play as hard as boys. They shouldn't strain themselves

In fact, research indicates that vigorous physical activity benefits girls, just as it benefits boys. Study after study has shown that the athletic girl or woman is more likely to enjoy overall good health than her nonathletic counterpart. Additionally, although this is not a factor for preadolescents, she is more likely to have fewer gynecological problems than her nonathletic counterpart. Over the years one of the major arguments cited against encouraging females to participate in strenuous sports has been that the stresses and strains of such competition could permanently damage the reproductive organs. According to Drs. Carl Klafs and M. Joan Lyon (authors of "The Female Athlete") and numerous other researchers, however, this point of view is quite simply invalid.[6] In fact, many gynecologists believe that vigorous activity improves the muscular support of the pelvic area. Additionally, the uterus is one of the most shock resistant internal organs (and considerably more protected than the male genitalia).

In short, according to Dr. Clayton L. Thomas (a leading sports physician):

> With respect to strenuous exercise for women, I do not believe there is evidence available supporting the view that it is possible for healthy women of any age to indulge in a sport which is too strenuous for them. The literature contains many opinions stating that competitive events are harmful for women. *There are no data, however, to support these negative views.*[7] (Emphasis added.)

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[3] 347 U.S. 483 (1954).

[4] See Kathleen M. Engle, "The Greening of Girl's Sports," Nation's Schools, September 1973, p. 29; and Interview with Dr. H. Roger Collins, Nation's Schools, September 1973, p. 30.

[5] See Richard W. Corbitt et al., "Female Athletics," Journal of the American Medical Association, June 3, 1974.

[6] See Carl E. Klafs and M. Joan Lyon, "The Female Athlete" (Saint Louis: The C. V. Mosby Company, 1973), pp. 54 ff.

[7] Clayton L. Thomas, M.D., P.P.H., "Effect of Vigorous Physical Athletic Activity on Women," paper presented at the University of Massachusetts, School of Physical Education, Amherst, Massachusetts, December 5, 1967, pp. 5–6.

Myth No. 3. Since contact sports are "different" from noncontact sports, boys and girls should have separate teams for contact sports

The legal justification for automatically treating contact sports differently is confused at best. Although some early court decisions made this distinction (and although the present unofficial draft of the proposed regulations for Title IX of the Education Amendments of 1972 makes this distinction), there is a great deal of legal opinion arguing that no differentiation should be made between contact and noncontact sports. Recently a Pennsylvania state court ruled (under the state Equal Rights Amendment) that single sex competition was equally unpermissable for contact, as well as noncontact, sports. In fact, the decision concluded that:

> Although the Commonwealth [Pennsylvania] in its complaint seeks no relief from discrimination against female athletes who may wish to participate in football and wrestling, it is apparent that there can be no valid reason for excepting those two sports from our order [to permit girls to practice and compete with boys in interscholastic athletics] in this case.[8]

Some people maintain that having women and men compete in contact sports would infringe on their privacy rights. Counsel for the New York City Board of Higher Education concluded, however, they did not believe that such participation in contact sports would violate a person's right of privacy.[9]

The "logical" arguments for treating contact sports differently also do not hold up very well under close inspection. For example, those who oppose mixed contact sports generally base their opposition on a concern for the physical safety of the women or on the idea that women and men should not be forced into "contact" situations. However, competitive athletics are, by their very nature, closely supervised, and medical experts and physical educators suggest that a preadolescent girl who plays a contact sport is no more susceptible to injury than a comparable preadolescent boy.[10]

Finally, when it comes down to definitions, just how would we define a "contact" sport? For example, do we count the number of times participants collide, even if they are violating a rule of the game by so colliding? Or do we somehow qualify or quantify the type of contact? I'll admit to being a bit surprised that one of the arguments used against letting girls play on Little League teams was that baseball is a contact sport!

Myth No. 4. Participating in coeducational sports or getting too much exercise will make girls muscle bound and "unfeminine"

Nothing could be further from the truth. In fact, given the same amount of exercise, the development of bulging muscles depends primarily on the amount of male hormone a person has[11] One need only take a look at the leading female athletes of today and yesterday (Billie Jean King, Donna DeVarona, Laura Baugh, Suzy Chafee, Olga Korbut, Cathy Rigby, etc.) or look at the women superstars on television to realize that being physically active does not mean that a woman or girl looks or acts "unfeminine."

Consider, too, the answer of Alan Eggland when he was a high school student in Iowa (a state where girls' basketball generally outdraws and outranks boys' basketball) when asked if girls in sports were popular in his school.

> Maybe this is something. * * * The homecoming dance is a big social event here. The last three years a girl who has been on one of the teams has been the queen of it. I think girls in sports are more popular, at least with the boys.[12]

Myth No. 5. Mixed team sports programs are somehow radical, unusual or disruptive

The fact of the matter is that, over the past few years, elementary and secondary schools (as well as a number of colleges and universities) have been quietly moving to coeducational sports offerings. It is now commonplace for institutions to have some or all physical education and instructional programs which are open to both sexes and for a wide variety of organizations to endorse mixed teams. For example, the National Association for Girls and Women in Sports has adopted an official position stating that their association:

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[8] *Commonwealth of Pennsylvania* v. *Pennsylvania Interscholastic Athletic Association*, No. 1526 C.D. 1973, opinion by Judge Blatt, filed March 19, 1975.

[9] Arthur H. Kahn and Michael D. Solomon, "Sex Integration in Contact Sports (Is It Mandated in Public Colleges?)", opinion prepared for the Board of Higher Education of the City of New York, 1973.

[10] See Corbitt, et al.

[11] See Engle, p. 29 and Collins, p. 30.

[12] Bill Gilbert and Nancy Williamson, "Are You Being Two-Faced?, Part 2: Women in Sport," *Sports Illustrated*, June 7, 1973, pp. 53–54.

> * * * believes that the immediate integration of physical education classes on the elementary school level is consistent with sound educational principles and a vital element of the long effort to overcome the harmful effects of traditional sex stereotyping which has severely limited the opportunities for girls and women in sport.[13]

A wide variety of other organizations and individuals evidenced their belief that mixed instructional and/or competitive opportunities were a key facet of equal athletic opportunity for women and girls in their comments on the proposed regulation for Title IX of the Education Amendments of 1972. For example:

Women's Equity Action League (WEAL).—"The [proposed] regulations require that all course offerings, including physical education classes, be integrated . . . The requirements for all integrated courses, including physical education classes, should be retained."

The Iowa Commission on the Status of Women.—"While the Commission members are aware of strong difference of opinion in regard to physical education, they supported the position of co-ed physical education classes."

University of Hawaii at Manoa.—"We support that course offerings in physical education should be open to all students."

U.S. Commission on Civil Rights.—"To facilitate progress [towards equal sports opportunity], elementary schools should be required to integrate immediately all sports teams, since girls and boys are of comparable size and strength at that level."

Midwest Association for Physical Education for College Women.—"It is no secret that from early childhood girls are discouraged from developing the basic motor skills common to most sports (throwing, jumping, coordinating, etc.) and that this social pattern has a marked effect upon their performance in sport. . . . [It] is clear that to achieve full potential, nondiscriminatory learning experience must begin to the earliest stages of education."

National Student Lobby.—"Separate teams are not acceptable in that they foster discrimination and allow past discrimination to continue to affect athletics."

National Organization for Women Legal Defense and Education Fund.—"This requirement [for sex-integrated instructional and physical education programs] is absolutely key to assuring equal sports opportunities for females, both in the long run and in the short."

American Alliance for Health, Physical Education and Recreation.—". . . we agree that there should be no discrimination and that classes should be open to both sexes. . . ".

Additionally, all indications are that having mixed teams would not cause discipline problems. There may, of course, be a brief adjustment period, as there is when any new policy is enacted. However, since such mixed sports opportunities are merely an extension of the coeducational sports opportunities that already exist in schools (and on some extra-school teams as well), children are likely to "adjust" very rapidly to mixed competition.

Myth No. 6. Coeducation will demoralize girls because boys will consistently outplay them

There is no reason to believe that preadolescent boys will consistently outplay girls. In fact, the Committee on the Medical Aspects of Sports of the American Medical Association has reported that:

> During preadolescence there is no essential difference between the work capacity of boys and girls.[14]

Similarly, Dr. Jack H. Wilmore has concluded that:

> Boys and girls are equally matched in their performance of physical activities up to 10 or 12 years of age. Tests of strength, muscular and cardiovascular endurance and motor performance show few differences between the sexes during this period.[15]

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[13] "Position Statement of National Association for Girls and Women in Sport," Adopted April 28, 1975.

[14] Corbitt et al., p. 1266.

[15] Jack H. Wilmore, "Exploding the Myth of Female Inferiority," The Physician and Sports Medicine, excerpted in the New York Times, July 7, 1974.

Certainly, at the outset of a coeducational program there may be differences between male and female performance in sports because of lack of opportunity, encouragement or training for girls in the past. And, in order to make an orderly transition to a mixed program, special interim efforts may need to be made to help encourage or train one sex or the other. It is encouraging to note that experience with coeducation has shown that these differences can be eliminated without a great deal of difficulty. For example, in a new coeducational physical education program at the Indiana School for the Deaf, teachers found students of one sex helping those of the other sex learn the skills which they had missed in the previously sex segregated programs. Is not such behavior the type that we wish to foster and build upon rather than discourage?

Myth No. 7. A boy will be demoralized if he is beaten by a girl

This belief is perhaps best summed up by the following two quotations, the first by a syndicated columnist in 1962 and the second by a Connecticut court judge in 1971:

> The competitive woman destroys something in a man * * * a thing called self-respect. The woman who competes with a man on his level and so destroys him may indeed create a pinnacle for herself, but it will be a tower of ridicule and a lonely spire. For only when a man stands tall can he build for women the pedestal he yearns to put her on.[16]
>
> The present generation of our younger male population has not become so decadent that boys will experience a thrill in defeating girls in running contests, whether the girls be members of their own team or an adversary team * * * Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow * * *.[17]

Fortunately, our boys are stronger than these quotations give them credit for being. The facts strongly contradict the contention that boys will suffer psychological damage by competing with girls. In New York State an experiment was run in 1969–1970, specifically to find out if boys in high school could withstand the stress of competing with and against girls. According to Dr. George H. Grover (director of physical education for the New York State Education Department), the boys in the experiment:

> * * * overwhelmingly believe that competing against a girl is not harmful physically, emotionally, and socially, except that a few feel that there is apt to be some slight emotional pressure or tenseness. . . . [Similarly, the girls] were unanimous in feeling that competing against a boy was not harmful to them physically, emotionally, and/or socially.[18]

Other studies agree that, far from hurting young males, coeducational athletic competition can be a positive experience. Indeed, the supposed trauma of coeducational sports is generally more imagined than real. For example, when students were surveyed in Boulder, Colorado, both the male and the female junior high school students supported the option of mixed physical education classes, with groupings made by interest.[19]

Myth No. 8. Young girls really don't want to compete against boys

The many girls who have gone through long struggles in order to "win" the right to compete with and against boys in such programs as Little League would disagree strongly with this myth. But, what people generally mean when they voice this concern is that girls will be embarrased by having to show their lack of skill or proficiency in front of boys. *If* it were true that there were really different physical capabilities among boys and girls of this age, this might be a legitimate long-range concern. However, as we have seen, there are *not* significant physical differences among boys and girls of this age. Therefore, to look at the issue from a positive standpoint, what we are really talking about is: How can we help young girls (who may already have fallen behind because of lack of encouragement and opportunity) catch up so that they can fully participate?

They will need our support and encouragement And, at the beginning, they may need an extra amount of basic skill training. We may have to work with young boys as well to encourage them to similarly support and encourage their sisters. But, as the Indiana example and numerous other experiences with mixed competition show, children adjust rapidly and are almost always enthusiastic about assisting one another. Indeed, it is sometimes more difficult for adults (and parents) to "adjust" to the idea of mixed sports than it is for the children actually involved. Or, as the editorial page of the *Boston Globe* put it in discussing Sharon Poole's attempt (in Haverill, Massachusetts) to join the Little League several years ago:

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[16] June Wilson, syndicated column appearing in the Des Moines Register, March 17, 1962.

[17] *Hollander* v. *the Connecticut Interscholastic Athletic Conference, Inc.*, No. 12–49–27 (Conn. Sup. Ct. 1971).

[18] "Woman—The Compleat Athlete?," Medical World News, May 24, 1974, p. 42.

[19] Sharon L. Menard et al., "Sex Role Stereotyping in the Boulder Schools: A Student Survey of Physical Education and Athletics," Lafayette, Colo., November 1974, p. 4.

> Obviously a parent will lose his or her sense of self-esteem if a girl strikes out his or her son or hits a homer off him or throws him out at second.[20]

Here is an opportunity for us to be led by our children who, as we've already seen, generally accept mixed sports and physical education with little fuss.

Myth No. 9. Girls aren't interested in sports as much as boys, they don't want to be active

Although there are some different participation patterns by sex, we are seeing these participation patterns for girls and boys grow closer. In fact, a recent study of junior high school students in Blouder, Colorado found that 78 *percent* of the girls in this age group wanted to play football![21]

The interest of girls and women in participating in active sports programs is growing by leaps and bounds Bill Gilbert and Nancy Williamson reported the following in Sports Illustrated in 1973:

> Repeatedly, when good girls' athletic programs are offered, the organizers are astonished by the response. For example, the Hillsborough County, Florida (Tampa) Recreation Department never had provided any organized programs in competitive sports for girls. It began to receive inquiries as to why not. In the spring of 1971 a recreation-department employee, Zoe Gray, organized a slow-pitch girls' softball program. . . . Competition was offered in three age divisions ranging from eight to 15. In the first year more than 1,000 girls turned out and were divided into 68 teams. Shocked at this unexpected development, officials last winter started similar basketball leagues. . . .[22]

And even a number of girls and women who would never want to play football question the quiet, unnaturally sedentary roles they have often been assigned. Listen, for example, to Scarlet O'Hara's comments in Margaret Mitchell's "Gone With the Wind":

> I'm tired of everlastingly being unnatural and never doing anything I want to do. I'm tired of acting like I don't eat more than a bird and walking when I want to run, and saying I feel faint after a waltz, when I could dance for two days and never get tired. I'm tired of saying "how wonderful you are" to fool men who haven't got one-half the sense I've got, and I'm tired of pretending I don't know anything, so men can tell me things and feel important while they're doing it.[23]

Myth No. 10. No one is interested in watching girls play anyway

It is certainly debatable whether this is a legitimate concern for the type of youth athletic program that we are discussing today. However, even if (for the sake of argument) we assume that it *is* a legitimate concern, the fact of the matter is that interest in watching women's and girl's sports is spreading like wildfire. For example, in Iowa girls' high school basketball attracts more spectators than the boys games.[24] Sports Illustrated reported in 1973 that some five to six million spectators watch the girls (but not the boys) state championship games via a nine-state TV network. According to the head of the Iowa Girls' High School Athletic Union:

> We are competing for the entertainment dollar * * * There is no reason why girls' events can't draw well if they are intelligently staged.[25]

Of course, the Iowa experience deals with all-female teams. It follows, however, that such enthusiasm would be even easier to generate for mixed teams.

These ten major myths about mixed team participation in sports by preadolescents have been with us for too long. Hopefully this hearing today will serve as in impetus to relegate these myths in their proper place—and their proper place is in a history book, not on our children's playing fields.

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[20] From Thomas Boslooper and Marcia Hayes, "The Femininity Game" (New York: Stein and Day, 1973), p. 72.

[21] Menard et al., p. 3.

[22] Gilbert and Williamson, p. 48.

[23] Margaret Mitchell, "Gone With the Wind," p. 79.

[24] For a rather extensive discussion of the history and growth of girls basketball in Iowa, see William J. Peterson, ed., "Girl's Basketball in Iowa," The Palimpsest, April 1968.

[25] Gilbert and Williamson, p. 50.

Attachments:

A. "Revolution in Women's Sports," from *Women Sports*, September 1974.

B. *Women's Athletics: Coping with Controversy*, selected papers from the 1973 AAHPER National Convention.

C. "College Athletics: Tug-of-War for the Purse Strings," from *Ms.*, September 1974.

D. "Title IX: New Rules for an Old Game," from *Teachers College Record*, February 1975.

E. "Sex Discrimination Against Students: Implications of Title IX of the Education Amendments of 1972," *Inequality in Education*, October 1974.

F. *Commonwealth of Pennsylvania* v. *Pennsylvania Interscholastic Athletic Association*, opinion of Judge Blatt.

G. "What Constitutes Equality for Women in Sport? Federal Law Puts Women in the Running," by the Project on the Status and Education of Women of the Association of American Colleges.

H. And, on the Lighter Side of the Issue. . . .

SUPPLEMENTARY TESTIMONY OF MARGARET C. DUNKLE FOR THE WOMEN'S EQUITY ACTION LEAGUE (WEAL)

In this supplementary testimony, I would like to elaborate upon four issues:

The need for positive action ("affirmative action") to assure that the transition to mixed teams is as smooth as possible.

What should be the dividing age between preadolescents and adolescents for athletic purposes?

The desirability and feasibility of mixed or coeducational recreational athletic activities for adolescents and adults.

Some possible nondiscriminatory options for "select" teams (highly competitive teams) for adolescents and *adults*.

Additionally, the supplementary information concerning mixed teams for contact sports which Ms. McClelland requested is enclosed.

I. The need for positive action ("affirmative action") to assure that the transition to mixed teams is as smooth as possible

As I mentioned in response to a question at the May 17 hearing, a program of positive or affirmative action could be extremely useful in assuring that the transition to mixed sex athletic teams be as orderly as possible. It is essential that those people working directly with the children be well informed and have a constructive attitude and approach to mixed teams.

We strongly urge that the following types of positive actions be implemented:

Workshops for the coaches for the formerly "female" and "male" teams to discuss and resolve their concerns and problems.

Having coaches work in teams (one formerly a coach of the "female" team and one formerly the coach of the "male" team), at least at the beginning, so that both the children and the coaches will be more comfortable and at ease during the transition period.

Having an evening information program for parents. Perhaps this could include the same type of factual information that was presented at the hearings (in a popularized form), as well as discussions by children who actually participate in mixed teams and by coaches of mixed teams.

Publicity (e.g., posters, radio announcements) announcing the "mixed team policy" and encouraging girls to sign up for sports that have previously been labeled "boys" and vice-versa.

Having programs (perhaps in the schools) to educate the students.

Provide a mechanism to monitor the transition and resolve any difficulties before they become great.

II. What should be the dividing age between preadolescents and adolescents for athletic purposes?

There is no firm and absolute answer to this question. Sometime after the age of ten, the average boy and girl begin to differ somewhat in terms of physical strength, muscle mass, flexibility, etc. These average differences increase as these children grow into adulthood. However, the average age when significant differences appear varies according to the skill in question. Also, the age at which an individual child enters puberty and exhibits the physical changes associated with puberty varies widely. There is a great deal of overlap between the physical strength, flexibility, size, etc., of females and males throughout their lives.

Given all of this, it becomes clear that any age cutoff (even one based on reliable averages) is inevitably unfair to some individual child. Therefore, WEAL argues that, whenever possible, recreational programs for preadolescents, adolescents and adults should be mixed. (This is further discussed in the next section.)

III. The desirability and feasibility of mixed or coeducational recreational athletic activities for adolescents and adults

WEAL (as well as many physical educators and other women's organizations) argues that in general there is no justification for single sex recreational or noncompetitive programs at any age level. WEAL believes that there are factors other than sex which can be used to divide individuals into teams.

Male and female preadolescents are approximately equal in terms of size, strength, flexibility, balance and other physiological factors that are important for excellence in sports. As we know, this *pattern* changes in adulthood: the *average* adult male is considerably larger and heavier than the *average* adult woman, and the *average* adult is considerably more flexible and has better balance than the adult male. These changes in averages become noticeable around puberty and increase in magnitude with time.[1]

However, averages can be misleading. Many adult women can outperform the average male (although a superbly fit adult female may be at a real disadvantage when competing with a superbly fit adult male in athletic contests which depend primarily on speed and strength). In the words of Dr. Thomas E. Shaffer, a noted authority in this area:

> * * * while there are very significant sex-related differences between males and females, it should be borne in mind that there are undoubtedly greater differences between the third and the 97th percentile in each sex than there are differences between the average female and the average male in terms of physical performance.[2]

In other words, all men are not superior to all women in all athletic skills. There is a good deal of overlap in ability between the sexes, so that a number of women out-perform a number of men.

Given these facts, it makes sense to have adolescent and adult teams divided by factors OTHER than sex. For example, for some sports random selection might be appropriate. For other sports, where contact injury is a problem (such as field hockey or football), it might be most appropriate to group adolescents and adults by height and weight (rather than sex and/or age). You might also have an additional provision allowing smaller people with outstanding athletic ability to move up to a "larger" sized team (but not allowing larger people to move down to a "smaller" league because of the extra possibility of injury that this would cause).

It is important to note in this model for adolescent/adult recreational programs that care should be taken to assure that the "larger" teams (which are likely to be all or predominantly male) do not receive preferential treatment in terms of facilities, scheduling, coaching, equipment, etc. Additionally, because of different interest patterns between women and men, it is possible that some of these programs might be all or primarily one sex programs. Hence, care should be taken to assure that any program or team which is primarily male is not given preference over a program or team which is primarily female in terms of facilities, equipment, scheduling, coaching, etc.

IV. Some possible nondiscriminatory options for "select" teams (highly competitive teams) for adolescents and adults

In contrast to recreational teams, at the adolescent and adult level, having only one coeducational or mixed top team would, in most instances, have the effect of eliminating almost all females from top level competition. Because of differences in physiology, opportunity and training, few adult women would make these teams. Therefore, it is necessary to look for alternate nondiscriminatory models which would provide equal opportunity regardless of sex. I would like to suggest several possible models for nondiscriminatory high level competitive or "select" teams for adolescents and adults:

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[1] It is important to note that the age at which puberty is attained varies considerably from person to person.

[2] Thomas E. Shaffer, "Physiological Considerations of the Female Participant," in Women and Sport: A National Research Conference, ed. Dorothy Harris (State College, Pennsylvania, 1972), p. 330.

Model 1. Separate teams.—For "select" competition, have separate female and male teams. (There should, of course, be no discrimination between these teams in terms of facilities, equipment, scheduling, coaching, etc.) If there is insufficient interest to have separate teams, then the single team should be open to members of either sex on the basis of skill.

Model 2. Separate teams with a provision allowing the "underdog sex" to compete up.—This model would be the same as the first model, with the following added provision. If one team (for example, the male team) had a considerably higher skill level than the other (the women's) team, you might allow the member of the team with the lesser skill level (here, the women's team) to "compete up" to the team with the higher skill level (here, the men's team). However, members of the "higher skill" team could not "compete down."

Model 3. One "open" team plus a team for the "effectively excluded sex."—First, establish an "open" team—that is, a team open to members of either sex without discrimination and on the basis of competitive skill. If this team is likely to be totally or predominantly composed of members of one sex, then an additional team should be established so that the other sex would have competitive opportunities. The first team would remain open to students of both sexes.[3] [Notice that the effect of Model 2 and Model 3 is the same, even though the philosophical assumptions are different for the two models.]

In summary:

Positive actions should be taken to assure that the transition to mixed teams is as smooth as possible.

It is impossible to define one definite dividing age between preadolescents and adolescents. Any one age cutoff is inevitably unfair to some individuals.

In general there is no justification for single sex recreational programs at any age level. There are factors other than sex which can be used to divide individuals into teams.

There are several nondiscriminatory models for selection to "select teams" (high level competitive teams).

Ms. RAFFEL. I am Dr. Norma Raffel, head of the Education Committee of the Women's Equity Action League (WEAL). WEAL is a national voluntary organization which promotes equality in education and employment through legislation, litigation, and by pressing for full enforcement of antidiscrimination laws on behalf of women. Also, I am a commissioner on the Pennsylvania Commission for Women and represent it on the Pennsylvania Department of Education's Task Force To Eliminate Sexism From the School.

Today I am speaking on behalf of WEAL. Congress passed title 9 to prohibit sex discrimination in educational programs and activities receiving Federal financial assistance in 1972. Now, 3 years later, there is real hope that HEW will have regulations so that the law can be fully enforced.

It became obvious as the regulations were being developed that eliminating sex discrimination from educational institutions was a large, complicated undertaking—mainly because the discrimination was so pervasive and had gone unrecognized for so long.

Eliminating discrimination because of sex in education will mean changing timeworn established practices to conform with the legal requirement of nondiscrimination. Quite naturally many groups and persons that have enjoyed or benefited by the preference given to males in the past will object to the application of the law, question its intent or scope, and attempt to delay equal opportunity in education.

It is up to us now to look calmly and clearly at the intent of Congress and the law and to allow these regulations which provide a reasonable framework to carry out the nondiscrimination principles of title IX to become effective so that enforcement can proceed.

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[3] This approach is further explained in Attachment J, a legal memorandum ("Validity of the 'Separate but Equal' Policy of the Title IX Regulation on Athletics") which was prepared by the Center for National Policy Review for the National Organization for Women Legal Defense and Education Fund's comments on the proposed Title IX regulations.

There are two areas which seem to be of major concern and I should like to briefly comment on them. They are the scope of coverage and athletics.

Scope of title IX coverage: There is some controversy over whether title IX prohibits discrimination in all of the educational programs and activities of an educational institution or just those programs and activities directly receiving Federal financial assistance. Crucial to resolving this problem is the interpretation of the phrase "education program or activity" found in section 901 of title IX.

Also in question is section 902 which deals with the scope of HEW's termination authority. Can HEW terminate all Federal financial assistance received by an educational institution which is found to be in violation of the law, only that financial assistance which goes directly to a specific program which discriminates, or can HEW terminate funds to any program which is affected by the overall discrimination in the institution?

Two excellent legal memorandums, one from the American Law Division of the Library of Congress and the other from the Center for National Policy Review at the Catholic University of America's School of Law address the interpretation of sections 901 and 902. They discuss the similarity between sections 901 and 902 and title VI of the Civil Rights Act of 1964. Because almost identical statutory language is used, it seems clear that title IX would provide the same kind of coverage as title VI and that the interpretation of title VI should be a guide for the interpretation of title IX.

Title VI has been interpreted as prohibiting racial discrimination in all aspects of the educational program in a school district receiving Federal aid. Therefore, in title IX the term "education program" should also be interpretated in its broadest sense—to encompass the entire education program offered by an educational institution receiving Federal financial assistance.

Title IX was legislated, according to the Congressional Record, to "provide equal access to men and women to the educational process and the extracurricular activities of the school" (117 Cong. Rec. 30407) by prohibiting discrimination in employment, admissions with certain exceptions, and in access to the programs and activities of the institution.

The intent of Congress would be defeated by anything but a broad interpretation. A narrow interpretation—that the law prohibits discrimination only in programs directly receiving Federal aid would be virtually impossible to enforce.

Federal money in many cases simply cannot be traced down to a specific program. Federal revenue-sharing funds permeate educational institutions providing direct and indirect aid to all educational programs including athletics. The commissioner of basic education in Pennsylvania said that it was impossible to trace revenue-sharing funds and he had to work on the assumption that all educational institutions in the State received some. If the money could be traced and only programs receiving direct aid were prohibited from discriminating, enforcement would be difficult, if not impossible.

For example, Federal money is used to buy a piece of school equipment. Would every class using that particular piece of equipment be obliged not to discriminate while adjacent classes not using the equipment be allowed to discriminate? Suppose the class used the equipment one semester and not the other. Could they discriminate one semester, but not the other? Imagine the kind of enforcement and recordkeeping involved in such a situation.

Many programs not directly receiving Federal moneys benefit indirectly from Federal assistance given to institutions for construction programs, development of programs and student aid. Money released because of Federal funding may be reallocated. For example, a school district receives a grant to develop an individual, flexible course of study in high school. Part of the teachers and administrative salaries involved in that project could be recaptured and returned to the general funds or be diverted to other programs.

Congress in section 901 provided a broad general prohibition against sex discrimination in education and then limited its scope by exempting certain institutions from the admission requirement—one aspect of the total program. If Congress had intended the scope of section 901 to be limited, there would be no need to mention the admission exemptions.

Section 902 of title IX deals with the scope of authority in terminating funds. Again, the same language is used in this section as in title VI. In the court case of the *Board of Public Instruction of Taylor County, Fla.* v. *Finch*, 44 F 2d (5th Cir. 1969) interpreted title VI to mean that funds should be cut off to programs directly receiving Federal aid and any other part of the total program which is "infected" by discrimination. The concept of "infection" is discussed in the legal memorandum I mentioned earlier. This concept is as relevant to sex discrimination as it is to race discrimination.

Thus we have in section 901 a general prohibition of sex discrimination and in section 902 a narrowing of the fund termination to those areas where discrimination has affected the program or activity. Any other interpretation would make equal opportunity for girls and women almost impossible to achieve under title IX.

Athletics: No other area of the title IX regulations have provoked as much comment, discussion, publicity, and emotion as the section which pertains to athletics. One sports commentator said that title IX is the biggest thing to hit athletics since the invenion of the whistle. That will indeed be true if it results in first-class citizenship for women athletics. In no other area of the educational program has the progress toward equal opportunity been more difficult and the inequities more apparent than in interscholastic and intercollegiate athletics.

WEAL has conducted studies of interscholastic sports programs in several States and found that girls programs were grossly underfunded, girls could use the facilities only when not needed or wanted by boys, and there was little inclination to change the situation.

For example, in 1973 a survey of Pennsylvania, excluding Philadelphia, revealed that 50 percent of the secondary schools (junior and senior high schools) offered no interscholastics sports programs for girls. In those that did, there was an average of seven sports offered for boys each year compared to 2.5 for girls. There were no interscholastic programs for girls in the junior high schools although the average junior high school offered four interscholastic sports for boys during the year.

A detailed study of one school district in a middle-class university community revealed that 10 times as much money was spent on the boys as on the girls programs—$74,874 for boys athletics and $7,704 for girls. The junior high schools in that area did not allow girls to use the gyms after school at all because they were used for boys programs. Only when it was pointed out that the school district was probably in violation of the law was any progress at all made. Girls in Pennsylvania certainly wanted more opportunities. The Assistant to the Secretary of Education wrote as early as 1972, "We have been swamped with complaints about girls' lack of access to athletic programs, facilities, equipment, and teams."

In that same year a study of sex discrimination in the Waco Independent School District in Texas revealed that $250,000 was allocated annually for boys athletics in the junior and senior high schools. The girls program was allocated $970—four-tenths of 1 percent of the boys. Girls were prohibited use of stadiums, athletic fields, equipment, and gymnasiums. No interscholastic, intercity, or intramural girls' teams were permitted in Waco. An athletic committee was appointed by the school board to recommend changes in athletic policies. They recommended and received approval for an expansion of the boys' programs with an estimated increase of athletic program. The need and desire for a girls' program was demonstrated by public protests by several parents' groups and the attempt to organize informally some girls' basketball teams at the junior high level.

The American public has supported athletic programs because it is convinced such activities help develop sound minds and bodies. Yet, half of the students—girls and women—are largely excluded. They are deprived the benefits of active sports participation including the opportunity to establish lifetime habits of exercise which promote an increased level of good health in adult life.

If participation in competitive sports programs are as beneficial to women as they are to men, why has there been such difficulty in increasing opportunities for women in this area? In large part the answer lies in a statement from the NCAA to collegiate athletic directors.

> Finally, hammer the impossibility of meeting the requirement of overall program equity for men and women without severe curtailment of men's programs which you have built carefully over the years * * *.

It appears that the NCAA is as opposed to the law itself which requires equity as it is opposed to the regulations which determine how equity is to be achieved.

Those of us who have worked directly with school administrators have often heard the same thought. "We can't take anything from the boys' programs and there is no money to develop one for girls." Of course, when boys have had virtually all of the money and facilities, sharing will be difficult. Going from preferential treatment to equal treatment will be something of a shock. However, this may be an appropriate time for educational institutions to reassess their total athletic programs taking into account the goals of education as well as the interests and the needs of all of its students.

It is highly unlikely that women's competitive sports programs will approach the expenditures that the men's programs now enjoy. Equal expenditures for male and female programs are not required by the regulations, only that those females who have an interest be given an equal opportunity at their ability level.

Money is one of the major obstacles in approving the athletic section of the regulations. Therefore, is is important to remember that most of the money now supporting men's sports in colleges and universities throughout the country comes from either student activities fees or the educational dollar. According to the March 15, 1974, New York Times, only 1 athletic department in 10 in this country makes a profit. The other nine run at a deficit.

According to the NCAA, the annual deficit of its members in conducting intercollegiate athletic programs in 1974 was $49.5 million. That fact, more than equal opportunity, may "destroy intercollegiate athletics as we have known it."

NCAA advocates that if all else fails, at least exempt revenue from revenue-producing sports from the requirements of title IX. Certainly this would be one way to insure the perpetuation of the status quo.

If an institution were one of the few fortunate ones which makes a profit in a sport such as basketball, it could, with such an exemption, award up to about 18 scholarships, plus monthly allowances for players, provide recruiting expenses, tutoring, and training meals for the team. Awards such as rings, jackets, or blankets could be given to players. They could fly the team, bands, families, and others to games. Equipment and facilities would be limited only by the amount of profit. An extravagant expenditure directly or indirectly related to the sport would be allowed. All of this could be done, not because it builds sounder minds and bodies, but because the sport earns money.

In contrast, the women's basketball team continues to operate in the same old way—often with no scholarships, certainly no monthly allowances, no recruiting expenses, no tutoring, or equipment and training facilities. The difference is the women's team doesn't earn a profit.

Supporting an exemption for the intercollegiate athletic programs because they earn money seems to say that when dollars come in, principal goes out.

Congress has already dealt with this aspect of the regulations. Senator Tower introduced an amendment to the Education Amendments of 1974 specifically exempting revenue-producing intercollegiate athletics from title IX. It passed the Senate, but was deleted by conference committee and was replaced by the Javits amendment calling for reasonable regulations governing intercollegiate athletics.

Achieving equal opportunity for women in sports has been further complicated by the differing physiology of women and men. That there are differences we are certain but if, when, and how much those differences should affect the participation of men and women in competitive athletics is not so certain.

Research on the physiology of women in sports is relatively recent and many questions are still unanswered. Cultural attitudes and physiological factors have not yet been thoroughly separated. We are entering a largely untested area. There are many different predictions about the best way to achieve equal opportunity in athletics. Experience and measurable results will identify those programs which are most effective.

The courts have given some direction and in general the regulations are compatible with those decisions. The flexibility allowed in the regulations regarding mixed and single-sex competitive athletics may be prudent at this stage.

WEAL believes that taken as a whole the title IX regulations provide a reasonable framework within which title IX can be implemented. We urge Congress to allow these regulations to become effective in July. Then the long overdue and much needed enforcement can begin.

More than 100 years ago at a conference in Pennsylvania women called for equal educational opportunities for their daughters—a goal not yet achieved. The title IX regulations will be a giant step toward that goal.

Thank you.

Mr. HALL. Thank you, Ms. Raffel.

On page 6 in the second paragraph, "The American public has supported athletic programs because it is convinced such activities help develop sound minds and bodies."

Ms. RAFFEL. Yes.

Mr. HALL. Sometimes when I see the enthusiasm that some fathers use in pushing sons into athletics I wonder if that is quite the case.

I have had some experience in the Illinois schools, and I can assure you that girls certainly have not been the only ones discriminated against in athletic programs. The pattern for too long I think has been that too many of the coaches were also the physical education teachers, and it always seemed that emphasis was on the varsity sport. I am concerned also about the feedback I get in the way of coaches who use drugs and let their boys play with injuries so that they extend their injuries.

These are the things that are of concern to me. If you open up the varsity sports, say, just in the high schools equally to girls, I wonder how many 90-pound female fullbacks, how much of a pounding she might have to take from a 240-pound tackle? We are talking about the physiology. It is a legitimate concern.

Ms. RAFFEL. As you know, contact sports—according to the regulations, if you have contact sports you don't have to allow boys and girls to play together.

Another point is that many sports do section their teams on weight and height. In fact, there are other things than sex so if you wanted to put the weight and height and so forth in there as factors in choosing the team, then the girl takes her chances along with whatever it is, the 90- or 100-pound young man who goes out.

You see, sometimes I feel we are protecting women from things that they, as sensible people, have a right to make a choice about.

I think that a woman has a right to determine whether she wants to take that risk or not, just like that poor skinny boy who takes the ribbing and pretty soon he would find out, and so would she, that they didn't measure up.

I think the injuries probably would not be more devastating to a woman than to a man.

Mr. HALL. You think a lot of it is psychological?

Ms. Raffel. I furthermore share your concern about emphasis on varsity sports. In some areas we have "negotiated with the school board," not pressing as hard as we might, so that we could increase our intramural programs which would benefit all students who work toward a varsity sport.

Mr. Hall. Would you have any idea in Pennsylvania, for example, how many varsity sports are carrying their own weight, that is, fend for themselves?

Ms. Raffel. No, I do not.

Mr. Hall. Mr. Eshleman.

Mr. Eshleman. Thank you, Mr. Chairman.

Dr. Raffel, I would like to ask you in behalf of your organization, and you have a right to testify either way under title IX regulations naturally, but since you testified for their implementation I would like to get on the record what your organization would recommend as to financing the certain increased costs this would take? You would have a choice, I guess—well, for public schools, we have only taxation, nothing else, unless you advocate a starters activity fee or something.

In college there is a choice of a tuition increase, activities fee increase, or increased Federal aid. Your organization would advocate paying this increased cost?

Ms. Raffel. I think there are two ways of looking at it. The first is we can share some of the budget, remembering that for years, and years, and years the boys or men have gotten an inappropriate share of the educational dollar for athletics.

Mr. Eshleman. May I interrupt at this point. Unless I am under a misconception and you are right on the appropriate share, you said 9 out of 10 athletic departments don't make a profit. However, I think it is true that football and basketball finance is limited only to profit, but they buy equipment and finance other sports, their own sport plus other sports, and as far as I know we are not giving any Federal tax dollars now to sports. We are not subsidizing sports and I would need a little hard convincing that we should start subsidizing sports with tax dollars.

I agree with you, that 9 out of 10 are not making a profit.

Ms. Raffel. I say they run at a profit.

Mr. Eshleman. They are still buying equipment and next year's uniforms, and financing more than their own sports, and financing some female sports also at the colleges. That is my understanding. It is not to an equal extent, I will grant you. Is that true or not true?

Ms. Raffel. I think, sir, the only 10 percent that make a profit are financing other boys' sports and perhaps girls' sports. As you say, there is a question that, with the ones that make the profit, that very small number in our country that do, then what is the support with that profit after expenses have paid for the particular sport, you know, how is that shared within the university or college, or community school? There I think we would find it is not equal with girls' and boys' programs at the moment.

But because we have title IX passed and there is that promise in the future there will be enforcement, some schools have taken some steps in the past few years to give more money to girls' sports.

The other point you make, of course, we know that there is not direct financial aid as far as we can determine in the sports programs, although there is financial aid given to construction of facilities in which these intercollegiate sports operate, so that is an indirect benefit.

So we are maintaining, of course, that this intercollegiate or an interscholastic sports program is part of the entire educational program of the institution.

Now, how do we finance it? I said, you know, we can take a little of that money that we really should have had for so many years when it should have been equally distributed from the beginning and it was not. OK, this is almost intolerable to same people. Then where are we going to get the other money?

It probably is going to cost a little bit of money and I don't know, in the tight situations we have you know, where we are going to get anything to measure up to what we would like to have. Remember that the girls' sports program today, even if we gave equal opportunity to girls to enter scholastic and intercollegiate programs they would not came anywhere near taking in the amount of money as boys. I feel the very few teams that make a profit don't have to fly their family and friends and the university community to the games. They don't have to have the luxuries that they have had before. I think they could probably play a good game of football or basketball without those luxuries.

I understand they are thinking of cutting down scholarships and I don't think that will drive spectators away. You could take a little off of that, and still make a sport at somewhat of a reasonable level which they have had before, and we can use that kind of money here.

I think it will take years to develop the kinds of programs which will lead to bigger collegiate athletic programs for girls.

Mr. **Eshleman**. You know, the news media has focused on the Big 10 and the bowl games, and so on, in this question, but I think I am a little more concerned about all of the public high schools in the United States and boys' and girls' sports there. You said take a little more money. Where do you get it in the public schools? Are you saying, in other words, increase taxation to equalize the sport? Is that the testimony of your organization?

I mean, actually our larger problem here is the public schools up to grade 12 and not colleges. That gets into glamor and publicity, but the larger problem is public schools.

Ms. **Raffel**. I am thinking, I worked with the school district for 2 or 3 years trying to work out just such a problem like this. We have found that much of the money, the costs for interscholastic girls' programs involves more of a use of facilities and an inordinate use of money for fancy uniforms and things like that. The real problem seems to be with interscholastic programs and the use of facilities. In other words, when we have basketball in the winter and the boys' varsity wants to practice 5 days a week they say, "I'm sorry we can't let the girls use that gym any day because of the boys practicing."

Mr. **Eshleman**. Are you saying maybe in the public schools it is mort of an administration problem than a money problem?

Ms. **Raffel**. The major part, you know, how much does it cost? We can use the same basketballs as the boys do, and it certainly does not cost much for uniforms and little T shirts run about $2.50 or $3.50. I don't think that cost is really relevant, but sharing the facilities which seems to cause problems, at least as we experienced in working directly with the school district.

I guess we are saying to them, if everyone shared, then you know, so you practice 3 days a week and the girls would have 2 days a week, or practice 2½ days a week. That is just something that you have to make do with.

Mr. **Eshleman.** I throw this out as a sidelight. I used to coach myself a long time ago, and I am pleasantly surprised by the advocates for women's sports. I agree three sporting events a night or an afternoon are too many, but you could have replaced JV basketball along with a girl's game and have a doubleheader of boys and girls instead of the JV's, which is two boys' teams.

I realize the up and coming athletes on the JV team won't like it, but I think it is a solution that won't cost more money.

Ms. **Raffel.** One of the solutions we worked out in the school district I worked with every afternoon, they have two sessions and have the learning center, and we used to call that the "library," opened and they would have 1¼ hour practice session each afternoon. One week the girls would have it first and then go home and the boys would have it the second week, and the next week switch back and forth.

That gave equal access to the facilities, the crux of the problem, at no extra cost. Being a coach yourself you may have associated with some persons where this emotion is so tied up with it. I had a daughter who wanted to play on the boys' basketball team in the junior high school because there was no other place she could play basketball. There were no girls' programs at all. The coach—you would think he would be a mature man, he certainly was a teacher—said to his colleagues in the locker room, "If she plays on the basketball team, she will have to take showers with the boys."

That kind of thinking is very difficult to overcome unless you have a legal basis to work on, and it will take a long time for that gentleman to give that opportunity to the girls.

Mr. **Eshleman.** Thank you. Mr. Chairman.

Mr. **O'Hara** [presiding]. Thank you.

Any questions?

Mr. **Hall.** Are you acquainted with Iowa State basketball? State of Iowa? Do you know the girls tournaments draw just as big a crowd in the State of Iowa as the boys draw?

Ms. **Raffel.** Yes, sir.

Mr. **Hall.** At least after the war I attended Iowa Wesleyan. That is why I was surprised, having been born and raised in Illinois, and I know there are some areas that have been doing right by the girls' athletic programs.

I can remember the first year I taught I happened to coach the junior high school team and, the first game, we played a team with a girl on the team. The first huddle we had, one boy said, "We can't guard her, we just can't guard her. We can't play."

I hope we have come a long way since that time.

Ms. **Raffel.** I think we have. You know they don't have those hangups so much because today the boys and girls both have long hair and sometimes it is only after the game that a person realizes that actually it was a girl.

Mr. **Hall.** I am glad you said it, not me.

No other questions.

Mr. O'HARA. Well, thank you very much, Dr. Raffel. We are very pleased you were able to appear before us. I have heard a great deal of your organization and I hear from them quite frequently. I want you to give my best regards to your president.

Ms. RAFFEL. Thank you.

Mr. O'HARA. The chair is going to announce that the House goes into session at 11 o'clock, so the Chair is going to ask both the Members and witnesses to try to be short, without losing your sense of questioning or the testimony, to be as brief as possible, because we have a schedule of five witnesses for today and it is tough to get that many in and you know what happens when the bells start ringing, the Members begin leaving and you don't have the kind of audience you ought to have.

Our next witness will be Lynn Heather Mack, executive director of the Intercollegiate Association of Women Students.

Miss Mack, we will be happy to hear from you.

STATEMENT OF LYNN HEATHER MACK, EXECUTIVE DIRECTOR, INTERCOLLEGIATE ASSOCIATION OF WOMEN STUDENTS

Ms. MACK. Mr. Chairman and members of the committee, my name is Lynn Heather Mack and I serve as executive director of the Intercollegiate Association of Women Students. I have been on the faculty of Temple University in Philadelphia, Pa., and am currently with the administration of Wake Forest University in North Carolina as director of residence life. I will also be teaching at Wake Forest.

Because of the perspectives afforded by these several capacities and because I have maintained a close and ongoing working relationship with students, I feel able to speak to the impact of title IX on students, staff, and faculty with some degree of accuracy. It is in the position of IAWS executive director that I address you today.

The Intercollegiate Association of Women Students (IAWS) was founded in 1923, formed from several regional associations established in 1913. This places us among the oldest national campus-related organizations in the country. IAWS is also the only national organization for all college women and is committed to the development of programs and resources encouraging women to identify and utilize their individual potential as educated and competent persons throughout their lives.

Due to the inherent implications of title IX of the Education Amendments of 1972, perhaps the one segment of those to be most directly and potentially affected are women students—the people for whom we speak. Most of the concern in relation to these guidelines has been expressed by those who will have to implement them—they have had the time and influence to contact and effect the decisions. And while their concerns are important, there has been a serious lack of attention paid to those who will be most affected by them—students. It is for that reason that IAWS trusts that this committee will take particular note of our comments and respond favorably.

IAWS now encourages this committee and the Congress of the United States to accept the regulations as issued by the Department of Health, Education, and Welfare's Office for Civil Rights on title IX as minimum standards, in order to finally provide an identifiable mechanism by which all can assess the degree to which obvious sex discrimination exists and most be remedied in their respective institutions. By no means can the regulations be considered exhaustive or completely adequate; yet they do provide an important set of criterion valuable in determining initial steps for the opening up of all education opportunities.

There is a very clear need for the regulations to be endorsed and implemented without delay. In the 3 years of waiting and uncertainties (which says nothing of the decades preceding) since the enactment of title IX, it would be impossible to determine the number of women who have been subjected to higher admissions standards for college entry; denied access to a desired professional education; exposed to sex role stereotyping high school counselors and textbooks; prohibited for fully developing their potential in basketball. The regulations you are now considering serve as a necessary tool to help those people avoid ongoing discriminations.

Dr. Jean Lane of Jersey City State College referred to a 1972 study before a Women's Equity Action League conference in New Jersey on April 25, 1974, evidencing a large discrepancy between grade point averages for males and females entering college. Forty-five percent of the females had a B-plus average while only 29 percent of the males had that average. That is why these guidelines are important now.

In reference to financial aid, the Educational Testing Service study in that area suggested that when the need criteria was the same, men were receiving $250 more than women, and that women were more likely to have strings attached to their stipends. This is why these guidelines are important now.

In the New York City University system, men are receiving $100 more than women as undergraduates and on the graduate level the difference is $1,000. That is why these guidelines are important now.

Women's teams are still forced to sell cookies to pay for uniforms and travel funds, although they may have a more successful record than their male counterpart which flies to their tournaments.

My sister serves as another example as a student in an all-girls school in Erie, Pa., which admitted male students for the first time this year. When it came time to go to gym class it was the boys that got the showers. The girls were not to take showers all year long. Thus, a further discrimination. In order for the girls to smell clean for the day they obviously could not assert themselves in classes which were coeducational, therefore the value of instruction was also lost. That is why these guidelines are important now.

Now, I learned in Sunday school that cleanliness was next to godliness, but I didn't know it was reserved for males.

I constantly talk to women students who have set their career objectives far below their potential, "because even though her college boards were 1,420 with a 3.85 average, a female can be a physician's assistant but not a doctor." And this has all happened since title IX was passed 3 years ago, but without specific recommendations as to how institutions will be expected to implement them, little progress has been made.

Any further delay in their full implementation will be evidence of nonresponsiveness to a need to provide women and men with a means by which they can urge their institution to grant equal opportunity to all persons receiving an education. After all, a woman pays no lower tuition for a degree which buys her a lower salary than her fellow male student.

Few persons or groups could presume to know the exact intent of Congress in the passage of title IX—the legislative history is unclear. Perhaps evidenced by the many interpretations, there is little agreement among Congresspersons as to their intent at that time.

Therefore, we address ourselves directly to the regulations and the impact they may have. In recommending your adoption of these implementation regulations we do not suggest that these meet every need we see exist; there are weaknesses. However, the critical fact is that there are significant positive proposals in so many areas which will do much to finally afford women a change for a fair education.

It is important to give attention here to some of the areas where the regulations are lacking. We are primarily concerned with four points at this time: elimination of single-sex organizations, access to course offerings, athletic opportunities for woman, and the effective discouragement of any student involvement in seeking compliance by their institution.

Elimination of single-sex organizations: Section 86.31 of the regulations deals with education programs and activities, and requires that an organization receiving "significant" support from the recipient institution cannot discriminate on the basis of sex in membership or access to benefits.

While the philosophical intent of this item may be thought to be positive, practically speaking, the effects would eliminate much of the value of programs existing on campuses today. Since it originated, IAWS has believed that a vital part of every women's education is her opportunities for active participation in various experiences which prepare her for a more meaningful life.

The growing complexities of society have and will continue to challenge the stereotyped roles women have traditionally played, and the result is a new freedom to select the most comfortable and growth-promoting lifestyle possible. We have developed five lines of analysis to demonstrate the potential harm in eliminating certain of these organizations. I refer you to my written testimony for complete remarks. Four will be discussed here. The affiliates of IAWS primarily fall into the category of a special type of single-sex group as few have men among their membership.

1. EDUCATIONAL INPUT

IAWS rejects efforts which would mean the elimination of groups such as our affiliates and other single-sex organizations whose valuable effect upon the total educational experience of the university community as a whole, whether limited to just those member participants or open to all in the community, cannot be denied or replaced/afforded by any other compliant group or agency of the recipient institution.

Fraternities and sororities have been exempted, along with several other types of organizations. In speaking with an aide to Representative Joe D. Waggonner (D-La.), it is our understanding that in that exemption the term "social" was unintentional—that title IX was not meant to necessitate the disbanding of any student organizations. Consider the effects—this provision would mean many programing groups as associated women students, men's residence councils, men's and women's honoraries and recognition societies such as Mortor Board could no longer receive funds or meetng facilities from the institution.

Can we question the value of any of these groups upon the members of such organizations? If eliminated, a means of social contact and organizational skills and understanding would also be eliminated. The only other type of organization which could provide such experience is the student government or coed residence hall groups. The problem in relying upon those is that, by nature, they are too small to provide adequate opportunities to as many students now found in the other types of organizations, and further, that not all students are interested in those types of groups.

Realize that the critical factor for our position here is that, based on the HEW definitions of remedial and affirmative action (86.3 (a and b)), some single-sex opportunities for women are necessary to allow women to attain the full level of their potentials, overcoming past barriers. The specific instance of women's programing and governing organizations is a primary concern. As has been recognized by the regulations, women have been historically socialized out of opportunities to develop certain capacities or organization, leadership, and other skills.

Women's organizations have provided the only definite channel for such development for women. To eliminate such groups, in effect, would be to encourage socialization out of other opportunities. Such groups are necessary, at the very least, until women have attained a level at which they, as a class, recognize and accept their competencies and will challenge and compete with others as men do now. These organizations, while usually limited to women in actual membership, provide educational, cultural, and social programs which benefit not only themselves but other members of the university community as well, and that includes men.

Therefore, in one respect, they are single-sex in direct membership, but in the other, the benefits are available to both sexes. Furthermore, men are only to benefit from women becoming sensitive to and more aware of their own potentials, and therefore stronger, more self-reliant, and more responsible.

2. LEADERSHIP AND THE HISTORICAL TRADITION

As has just been indicated, there is a decided need for opportunities to develop leadership skills among women, but this area deserves further attention. Leadership does not mean only learning to run meetings, form committees, or take minutes. Rather, leadership necessarily means learning to be more sensitive to the overall operations of any organization—on campus or societal; religious, political systems, et cetera—understanding the constraints operating on all members of the system. It means learning how to follow as well as to lead.

Women's organizations are devoted to just such goals. Throughout a long tradition women have sought to collect with one another and have grown through the effects of such gatherings. Further, historically, few other organizations can parallel the continuous, strong, and active existence of women's organizations. If history be a guide to the future, then the fact that these organizations have been in existence so long should indicate that there is an inherent value in them.

3. RIGHT TO ASSOCIATION

As was pointed out by many respondents to the proposed rules to title IX last fall, the provisions relating to prohibition of education programs and activities which are single-sex in nature may well be unconstitutional in view of the first amendment of the U.S. Constitution guaranteeing citizen's right to association with those of her/his choosing.

Almost all college students are now of the age of majority thus fully insuring them all rights of citizenship. A very important stage in any person's development is the opportunity to explore previously acquired interests with those of one's choosing, and to learn new experiences from others of reference groups one selects. Can we legislate what type of groups from which one will be able to select? Students and others in the academic community must be free to organize to promote interests they share with others—be they of one sex or both. It is the strong belief of IAWS that appropriate committees of the institution itself should be the ones determining which a group contributes significantly to be university community and should therefore have student funding.

4. AFFIRMATIVE ACTION

It has been pointed out that there has been and continue to be discrimination on the basis of sex with regard to educational opportunities and benefits from those opportunities thereby establishing the need for remedial action to overcome such discriminations. One such measure would be to continue the availability of those single-sex organizations which provide specific skills to those persons who may not be able to obtain those skills through other educational activities or programs or a recipient institution due to such historic and attitudinal discriminations.

Often such discrimination has been unclear or difficult to pinpoint, yet the fact that studies have indicated that members of one sex do not come out of college on the same basis as members of the other sex evidences the fact that discrimination does exist. In view of this, it is essential that affirmative actions be taken by institutions to not only maintain existing single-sex, nonprofessional organizations and activities—not to the exclusion of other valuable groups—but to encourage and actively support such groups. It has all too frequently been the case that such organizations must fight a difficult battle to justify their existence to the various components of their institutions.

On balance then, it is evident that there is more to be lost in terms of the total educational environment of the institution through the elimination of support for these groups than if they aren't forbidden. Consequently, IAWS hopes that 86.31 will be adjusted so as not to eliminate single-sex, nonprofessional organizations through the removal of financial, physical, and administrative support for such groups. We find it difficult to accept that because of legislation attempting to remedy such discrimination, those organizations formed as a result of attempting to deal with that discrimination will be eliminated.

In reference to "Access to Course Offerings," since time is limited, I only request you consider our comments concerning that area in our written testimony.

ATHLETIC OPPORTUNITIES FOR WOMEN

Previously, IAWS has suggested that women are currently taking advantage of new freedoms to explore and define beyond the traditional roles and are selecting lifestyles which are most comfortable and personally satisfying. Such redefinition has found women increasingly interested and active in a variety of athletic programs. Even with such obvious and significant changes in interest and participation by women, progress has not been paralleled in opportunities available.

At the 1974 National Convention of IAWS, the first resolution discussed and subsequently passed unanimously by the convention body reaffirmed its support of title IX. A specific reference in this position was made regarding provisions for equal opportunity for women and men in athletic programs [See Appendix D].

We realize that the area of coverage of athletics under the title IX regulations has probably been the single most controversial issue as to whether it should or should not be a matter left up to HEW. Although it is quite weak in many areas, it is critical that it is included in the coverage and that Congress accept those provisions along with the rest of the regulations.

To consider that athletics not be appropriate under title IX coverage is to turn back the progress that has been made and to once again have opportunities for girls and women placed in an inferior position. Small steps have have been made in some schools and colleges in terms of increasing the scope of athletic opportunities for females, whether in the classroom or in competition. But despite these small advances, women's athletic programs still only average about two percent of the athletic dollar.

Perhaps the most glaring omission in these final regulations is the removal of the requirement of determining student interest. There is no suggestion for the measurement of that interest and it now seems probable that the scope of any women's athletic program will be subject to the personal evaluations of the need for particular teams by any individual or group of athletic administrators. Thus, student input is not going to be required. Arbitrary and random questioning of students—such as exists on some campuses today—will be considered sufficient indicators of determining interest—hardly a representative measure. Students must be allowed to determine what programs they want included.

Many efforts have been made to exempt income-producing sports from coverage under title IX. Fortunately, to this time these efforts have been unsuccessful.

It has been suggested that these sports should not be covered because they produce so much of the funds necessary to support these programs, and to have to share these funds if an athletic program were to be fairly expanded to include women would mean the end of their programs as they have enjoyed them. No consideration has been given to the fact that if need be, women's athletics could begin to support themselves to a degree if proper attention to establishing them is given.

As with creating interest in any area, an audience has to be developed for the product. Without adequate support in terms of advertisement, facilities, competitive practice and playing time, and general respect for the women involved, these programs will not draw. This is not just theory. In Iowa, girl's basketball is more popular than that of the boys. Consider the following that the Immaculata College's basketball team has created. Due to the exposure given women's tennis through Billie Jean King, Chris Evert, and others, that too has a significant following. Athletes like Cathy Rigby and Olga Korput have popularized women in gymnastics and the examples continue.

The criterion set forth for evaluating whether equal opportunity has been given, if followed closely, should do much in affording women a competitive opportunity. In no way should these be construed to be beyond the needed coverage of the title IX regulations. Obviously, the entire set of premises upon which sex role differentiation was based has been under keen scrutiny during the past several years. Certainly the notion that women do not maintain a growing interest in competing in athletics has been dispelled with such developments as the active women's athletic programs at all levels of education and the community activities throughout the country, as well as the dramatically increased number of professional women athletes.

The opportunities afforded women in sports have been slim and have created difficulties for individual participants in terms of the personal financial outlay required of her—unlike her male counterpart. Although they are not fully comprehensive, it is essential that the title IX regulations be adopted immediately with the athletic sections intact so that the advances which have been made are not lost. Women need these provisions to give them the effectiveness that male athletes have had through their intercollegiate association.

SELF-EVALUATION AND COMPLIANCE

IAWS is extremely concerned that provision is not made in section 86.3 to assure that students will be a part of the self-evaluation mechanism at an institution. There is a great fear that perhaps this area will need strengthening later; because it is quite easy for an institution conducting a self-evaluation, to determine they are in compliance with the regulations because of the way by which they have defined various aspects of the standards. It may become very easy to stretch a term—or ignor it completely—rather than admit that the institution does discriminate against women.

Unfortunately, not all administrators share the "good faith concern" for providing women with an equal education and educational experience. Many are not even aware that their attitudes and policies are casting women into substandard roles and providing inferior opportunities. With the guaranteed input of students on an evaluation committee, there is more likely to be a well-rounded valuation made with all perspectives taken into consideration. It is unfortunate that administrators would not be totally objective, but the fact does exist in some situations.

On one campus a women who did file a complaint against the university was strongly encouraged to find another campus for herself in the fall. That pressure was easier than for the university to accept the fact that vast changes in its regulations and housing structures will be needed to comply with title IX.

Throughout the process of evaluation and grievance, students have very few options in terms of attempting to remedy discriminations. Under the proposed procedural regulations, if HEW doesn't happen to be planning a review of that campus within the next 12 months—even that would be long in terms of the transient nature of the student population—the student has the choice of taking the complaint to the school's grievance board for them to deal with directly—which is like a judge asking a person he has just convicted to clean his house, or the student can take it to the State human relations court. This option is equally futile because (a) the student does not have the financial ability to do this, and (b) he doesn't have the time due to his short time at the institution and the time involved in litigation.

Provisions must be made for students to have a fair opportunity to hold the institution they are attending accountable for providing the quality education they are required by law to do.

These four areas have dealt with specific weaknesses we feel exist in the title IX regulations. However, IAWS feels that it has expressed quite strongly that regardless of these points, the regulations must be accepted. The time was spent with these in the hopes that our opinions can be considered should future legislation come up or further hearings held.

There are many strengths in the regulations which will mean finally that women will have the educational opportunities they deserve. Many areas of the regulations will probably have to be clarified in legislation, but I must stress that the efforts involved are well spent.

In our enthusiasm to eliminate sexual discrimination in education, we must take care not to eliminate also those very programs which have finally been developed which attempt to take remedial action to overcome the past in terms of discrimination against either sex in the same way similar programs do when discriminated minorities have been encouraged.

The passage of these regulations and their implementation are fully appropriate for congressional action. Allow them to go into effect July 21, 1975, so that women are not left without enforcement measures for obtaining their education.

I thank you for your attention and your concern for providing educational opportunities equally for the women students of our country as men have enjoyed for years.

[Prepared statement follows:]

PREPARED STATEMENT OF LYNN HEATHER MACK, EXECUTIVE DIRECTOR, INTERCOLLEGIATE ASSOCIATION OF WOMEN STUDENTS (IAWS)

Mr. Chairman and members of the committee: My name is Lynn Heather Mack and I serve as Executive Director of the Intercollegiate Association of Women Students. I have been on the faculty of Temple University in Philadelphia, Pennsylvania and am currently with the administration of Wake Forest University in North Carolina as Director of Residence Life. I will also be teaching at Wake Forest. Because of the perspectives afforded by these several capacities and because I have maintained a close and on-going working relationship with students, I feel able to speak to the impact of Title IX on students, staff, and faculty with accuracy. It is in the position of IAWS Executive Director that I address you today.

The Intercollegiate Association of Women Students (IAWS) was founded in 1923, formed from several regional associations established in 1913. This places us among the oldest national campus-related organizations in the country. IAWS is also the only national organization for all college women and is committed to the development of programs and resources encouraging women to identify and utilize their individual potentials as educated and competent persons throughout their lives. We support the philosophy that the higher education of women requires the existence of a special organization to meet their unique educational needs, in view of the subtle and overt discriminations experienced primarily by women in our society. Due to the inherent implications of Title IX of the Education Amendments of 1972, perhaps the one segment of those to be most directly and potentially affected are women students—the people for whom we speak. Most of the concern in relation to these guidelines has been expressed by those who will have to implement them—they have had the time and influnce to contact and effect the decisions. And while their concerns are important, there has been a serious lack of attention paid to those who will be most affected by them—students. It is for that reason that IAWS trusts that this Commitee will take particular note of our comments and respond favorably.

IAWS now encourages this Committee and the Congress of the United States to accept the regulations as issued by the Department of Health, Education, and Welfare's Office for Civil Rights on Title IX as minimum standards, in order to finally provide an identifiable mechanism by which all can assess the degree to which obvious sex discrimination exists and must be remedied in their respective institutions. By no means can the regulations be considered exhaustive or completely adequate; yet they do provide an important set of criterion valuable in determining initial steps for the opening up of all educational opportunities.

There is a very clear need for the regulations to be endorsed and implemented without delay. In the three years of waiting and uncertainties (which says nothing of the decades preceding) since the enactment of Title IX, it would be impossible to determine the number of women who have been subjected to higher admissions standards for college entry; denied access to a desired professional education; exposed to sex-role stereotyping high school counselors and textbooks; prohibited from fully developing their potential in basketball. The regulations you are now considering serve as a necessary tool to help those people avoid on-going discriminations.

Dr. Jean Lane of Jersey City State College referred to a 1972 study before a Women's Equity Action League conference in New Jersey on April 25, 1974, evidencing a large discrepancy between grade point averages for males and females entering college. Forty-five percent of the females had a B+ average while only twenty-nine percent of the males had that average. That is why these guidelines are important now. In reference to financial aid, an Educational Testing Service study in that area suggested that when the need criteria was the same, men were receiving $250 more than women, and that women were more likely to have strings attached to their stipends. That is why these guidelines are important now. In the New York City University system, men are receiving $100 more than women as undergraduates and on the graduate level the difference is $1000. That is why those guidelines are important now. Women's teams are still forced to sell cookies to pay for uniforms and travel funds, although they have a more successful record than their male counterpart which flies to their tournaments. That is why these guidelines are important now.

I constantly talk to women students who have set their career objectives far below their potential, "because even though her College Boards were 1420 with a 3.85 average, a female can be a Physician's Assistant but not a doctor." And this has all happened since Title IX was passed three years ago, but without specific recommendations as to how institutions will be expected to implement them, little progress has been made. Any further delay in their full implementation will be evidence of non-responsiveness to a need to provide women and men with a means by which they can urge their institution to grant equal opportunity to all persons receiving an education. A women pays no lower tuition for a degree which buys her a lower salary than her fellow male student.

Few persons or groups could presume to know the exact intent of Congress in the passage of Title IX—the legislative history is unclear. Perhaps evidenced by the many interpretations, there is little agreement among Congresspersons as to their intent at that time. Therefore, we address ourselves directly to the regulations and to the impact they may have. In recommending your adoption of these implementation regulations we do not suggest that these meet every need we see exist; there are weaknesses. However, the critical fact is that there are significant positive proposals in so many areas which will do much to finally afford women a chance for a fair education.

It is important to give attention here to some of the areas where the regulations are lacking. We are primarily concerned with four points at this time: elimination of single-sex organizations, access to course offerings, athletic opportunities for women, and the effective discouragement of any student involvement in seeking compliance by their institution.

ELIMINATION OF SINGLE-SEX ORGANIZATIONS

Section 86.31 of the Regulations deals with Education programs and activities, and requires that an organization receiving "significant" support from the recipient institution cannot discriminate on the basis of sex in membership or access to benefits. While the philosophical intent of this item may be thought to be positive, practically speaking the effects would eliminate much of the value of programs existing on campuses today. Since it originated, IAWS has believed that a vital part of every woman's education is her opportunities for active participation in various experiences which prepare her for a more meaningful life. The growing complexities of society have and will continue to challenge the stereotyped roles women have traditionally played, and the result is a new freedom to select the most comfortable and growth-promoting lifestyle possible. We have developed five lines of analysis to demonstrate the potential harm in eliminating certain of these organizations. The affiliates of IAWS primarily fall into the category of a special type of single-sex group as few have men among their membership.

(1) *Educational Input.*—IAWS rejects efforts which would mean the elimination of groups such as our affiliates and other single-sex organizations whose valuable effect upon the total educational experience of the university community as a whole, whether limited to just those member participants or open to all in the community, cannot be denied or replaced/afforded by any other "compliant" group or agency of the recipient institution. Fraternities and sororities have been exempted, along with several other types of organizations. In speaking with an aide to Representative Joe D. Waggonner (D–La.), it is our understanding that in that exemption the term "social" was unintentional—that Title IX was not meant to necessitate the disbanding of any student organizations. Consider the effects—this provision would mean many programming groups as Associated Women Students, Men's Residence Councils, men's and women's honoraries and recognition societies such as Mortar Board could no longer receive funds or meeting facilities from the institution.

Can we question the value of any of these groups upon the members of such organizations? If eliminated, a means of social contact and organizational skills and understanding would also be eliminated. The only other type of organization which could provide such experience is the student government or co-ed residence hall groups. The problem in relying upon those is that, by nature, they are too small to provide adequate opportunities to as many students now found in the other types of organizations, and further, that not all students are interested in those types of groups.

Realize that the critical factor for our position here is that, based on the HEW definitions of remedial and affirmative action (86.3 (a and b)), some single-sex opportunities for women are necessary to allow women to attain the full level of their potentials, overcoming past barriers. The specific instance of women's programming and governing organizations is a primary concern. As has been recognized by the Regulations, women have been historically socialized out of opportunities to develop certain capacities for organization, leadership, and other skills. Women's organizations have provided the only definite channel for such development for women. To eliminate such groups, in effect, would be to encourage socialization out of other opportunities. Such groups are necessary, at the very least, until women have attained a level at which they, as a class, recognize and accept their competencies and will challenge and compete with others as men do now. These organizations, while usually limited to women in actual membership, provide educational, cultural, and social programs which benefit not only themselves but other members of the university community as well, and that includes men. Therefore, in one respect, they are single-sex in direct membership, but in the other, the benefits are available to both sexes. Furthermore, men are only to benefit from women becoming sensitive to and more aware of their own potentials, and therefore stronger, more self-reliant, and more responsible.

Considering that only about 20% of the student's time is spent in the classroom, learning must occur during that other 80%. To prohibit such single-sex would mean a loss of their input into the educational community. Most proficiencies develop in a social environment and in interactions with others.

(2) *Leadership and the Historical Tradition.*—As has just been indicated there is a decided need for opportunities to develop leadership skills among women, but this area deserves further attention. Leadership does not mean only learning to run meetings, form committees, or take minutes. Rather, leadership necessarily means learning to be more sensitive to the overall operations of any organization (on campus or societal—religious, political systems, etc.), understand the constraints operating on all members of the system, and therefore becoming more tolerant of the members and of the system. It means learning how to follow as well as to lead.

Women's organizations are devoted to just such goals. Throughout a long tradition women have sought to collect with one another and have grown through the effects of such gatherings. Further, historically, few other organizations can parallel the continuous, strong, and active existence of women's organizations. If history be a guide to the future, then the fact that these organizations have been in existence so long should indicate that there is an inherent value in them.

(3) *Right to Association.*—As was pointed out by many respondents to the Proposed Rules to Title IX last fall, the provision relating to prohibition of education programs and activities which are single-sex in nature may well be unconstitutional in view of the First Amendment of the United States Constitution guaranteeing citizen's right to association with those of her/his choosing. Almost all college students are now of the age of majority, thus fully insuring them all rights of citizenship. A very important stage in any person's development is the opportunity to explore previously acquired interests with those of one's choosing, and to learn new experiences from others of reference groups one selects. Can we legislate what type of groups from which one will be able to select? Students and others in the academic community must be free to organize to promote interests they share with others—be they of one sex or both.

If a group of persons determine a common interest, regardless of the composition of the group by sex, and if the persons responsible for the awarding of monetary or physical plant support deem that this group serves a value in the educational environment of the community, it should be allowed to not only exist but receive those funds and facilities necessary for its operations as deemed appropriate by the institution it is serving. Consequently, for these reasons also, Title IX must not eliminate the potential for single-sex organizations by removing its source of funding, housing, or administrative support, as all students have an equal right to associate with those she/he chooses in order to promote his/her interests.

(4) *Consistency throughout Title IX.*—If these regulations and the concepts which prompted its development are to be strong and effective, it must remain consistent throughout. There are several inconsistencies, two of which are cited here—a paradigm drawn to exemption for single-sex schools in admissions and a paradigm drawn for the allowance of separate athletic teams. The existence of both suggests that it is recognized that important functions are provided through single-sex operations. As a precedent has been established in these two unrelated instances, we would hope that 86.31 would be brought into agreement with the exceptions through Congressional action. There are benefits to be accrued from single-sex organizations, as suggested here and through previous exemption granted for fraternal organizations and other such social organizations. Consistency would have the effect of making the Regulations a stronger and more cohesive unit.

(5) *Affirmative Action.*—It has been pointed out that there has been and continues to be discrimination on the basis of sex with regard to educational opportunities and benefits from those opportunities, thereby establishing the need for remedial action to overcome such discriminations. One such measure would be to continue the availability of those single-sex organizations which provide specific skills to those persons who may not be able to obtain those skills through other educational activities or programs of a recipient institution due to such historic and attitudinal discriminations.

Often, such discrimination has been unclear or difficult to pinpoint, yet the fact that studies have indicated that members of one sex do not come out of college on the same basis as members of the other sex evidences the fact that discrimination does exist. In view of this, it is essential that affirmative actions be taken by institutions to not only maintain existing single-sex, non-professional organizations and activities (not to the exclusion of other valuable groups) but to encourage and actively support such groups. It has all too frequently been the case that such organizations must fight a difficult battle to justify their existence to the various components of their institutions.

On balance then, it is evident that there is more to be lost in terms of the total educational environment of the institution through the elimination of support for these groups than if they are not forbidden. Consequently, IAWS hopes that 86.31 will be adjusted so as not to eliminate single-sex, non-professional organizations through the removal of financial, physical, and administrative support for such groups.

ACCESS TO COURSE OFFERINGS

Section 86.34 dealing with Access to Course Offerings is an important area in that exclusion of persons of one sex in various classes has tended to reinforce the sex-role stereotyping to which a student has been subjected in society. It is expected that with this requirement, both boys and girls will be able to pursue their individual interests, even if they are not in line with what has been traditionally expected from a student of a particular sex. The result will be a broader education suited to the individual needs of each student, assuming he/she obtains the actual non-sexist counseling aimed for through these regulations and the proper encouragement from family and peers.

IAWS sees some difficulty in terms of paragraph (b) where no specific person or group is indicated as responsible for determining the "objective" standards of individual performance for the purpose of making ability-level groupings. It would appear quite possible that an individual in any school system or physical education department could apply his/her own standards which may be clearly non-objective in lieu of any standardized measurement. Consequently, "groupings" identical to current sex-differentiated classes may conveniently result. This provision can easily escape notice when the school conducts its self-evaluations, and the major difficulty is that the student will again be the last to know that he/she has been subjected to further discrimination. IAWS would like to see a more specific recommendation as to the establishment of common standards to be widely adopted.

ATHLETIC OPPORTUNITIES FOR WOMEN

Previously, IAWS has suggested that women are currently taking advantage of new freedoms to explore and define beyond the traditional roles and are selecting lifestyles which are most comfortable and personally satisfying. Such redefinition has found women increasingly interested and active in a variety of athletic programs. Even with such obvious and significant changes in interest and participation by women, progress has not paralleled in opportunities available.

At the 1974 National Convention of IAWS, the first resolution discussed and subsequently passed unanimously by the convention body reaffirmed its support of Title IX. A specific reference in this position was made regarding provisions for equal opportunity for women and men in athletic programs (See Appendix D). We realize that the area of coverage of athletics under the Title IX regulations has probably been the single most controversial issue as to whether it should or should not be a matter left up to HEW. Although it is quite weak in many areas, it is critical that it is included in the coverage and that Congress accept those provisions along with the rest of the regulations. To consider that athletics not be appropriate under Title IX coverage is to turn back the progress that has been made and to once again have supporting opportunities for girls and women placed in an inferior positions. Small steps have been made in some schools and colleges in terms of increasing the scope of athletic opportunities for females, whether in the classroom or in competition. But despite these small advances, women's athletic programs still only average about 2% of the athletic dollar.

IAWS agrees with the basic aspiration of most recipients' intercollegiate administrators to offer as comprehensive a program as possible. However, we recognize that the philosophy of providing a broad range of opportunities has not been equally applied to all students, and therefore, the best interests of the recipients and their total university community have not been met. For example, a comprehensive program cannot exist when men's athletics are in the Intercollegiate Athletics department devoted solely to that purpose, and women's programs are among the many concerns in the Physical Education department. Especially today, in order to build further public/student support (which has been defined as a major purpose of the intercollegiate program), it is necessary that equal opportunity be provided for all students regardless of sex in intercollegiate programs. It appears that this need has been recognized through the provisions of section 86.41, although they could have been much more forceful and effective.

Perhaps the most glaring omission in these final regulations is the removal of the requirement of determining student interest. There is no suggestion for the measurement of that interest and it now seems probable that the scope of any women's athletic program will be subject to the personal evaluations of the need for particular teams by any individual or group of athletic administrators. Thus, student input is not going to be required. Arbitrary and random questioning of students (such as exists on some campuses today) will be considered sufficient indicators of determining interest—hardly a representative measure. Students must be allowed to determine what programs they want included.

Many efforts have been made to exempt income-producing sports from coverage under Title IX. Fortunately, to this time, these efforts have been unsuccessful. It has been suggested that these sports should not be covered because they produce so much of the funds necessary to support those programs, and to have to share these funds if an athletic program were to be fairly expanded to include women would mean the end of their programs as they have enjoyed them. No consideration has been given to the fact that if need be, women's athletics could begin to support themselves, if proper attention to establishing them is given. As with creating interest in any area, an audience has to be developed for the product. Without adequate support in terms of advertisement, facilities, competitive practice and playing time, and general respect for the women involved, these programs will not draw. This is not just theory. In Iowa, girl's basketball is more popular than that of the boys. Consider the following that the Immaculata College's basketball team has created. Due to the exposure given women's tennis through Billie Jean King, Chris Evert and others, that too has a significant following. Athletes like Cathy Rigby and Olga Korbut have popularized women in gymnastics.

The criterion set forth for evaluating whether equal opportunity has been given, if followed closely, should do much in affording women a competitive opportunity. In no way should these be construed to be beyond the needed coverage of the Title IX Regulations. Obviously, the entire set of premises under which sex role differentiation was based has been under keen scrutiny during the past several years. Certainly the notion that women do not maintain a growing interest in competing in athletics has been dispelled with such developments as the active women's athletic programs at all levels of education and the community activities throughout the country, as well as the dramatically increased number of professional women athletes.

In an extension of these remarks, IAWS feels that while these concepts are basically concerned with providing participation opportunities which are equal for members of both sexes, its "non-discriminatory" spirit should apply to all aspects of the program. In this respect, special mention should be made of two matters:

A. Publicity is itemized among the Equal Opportunity standards. To expand this, publicity efforts on behalf of intercollegiate sports should be made without regard to the sex of the participants. Efforts should be taken to promote the total athletic program and to avoid giving unequal publicity to teams whose members are of one sex or the other.

B. A very important and heretofore unconsidered aspect is that opportunities to solicit gifts and contributions should be equal for representatives of the men's and women's programs. IAWS believes the recipient should include legislative allocations, student fees, contributions, gifts, gate receipts, and kindred under and investigation and within guidelines set for eliminating inequities which now exist.

IAWS suggests that there is one other area which could strengthen the total impact of the athletic considerations of Title IX, and that relates to the recruitment of women athletes. In view of the remarks on p. 22229, col. 2 of the *Federal Register*, Vol. 39, No. 120, which state that such additional efforts may also be taken, ". . . in order to correct the effects of conditions which have had the effect of limiting the admissions of members of one sex, to the recipient's educational program or activity . . .," a justification, if not an actual directive, is established for *special* recruitment efforts for women in athletic programs because conditions and conditioning have kept them from being fully accepted in the area of sports. The impact of recruitment on the award of financial aid cannot be divorced one from the other. We hope that the suggestion that "reasonable" opportunities for such awards (86.37 c 2) will not provide a means by which recipients will skirt their responsibility to seek out and assist women in athletics.

The opportunities afforded women in sports have been slim and have created difficulties for individual participants in terms of the personal financial outlay required of her (unlike her male counterpart). Although they are not fully comprehensive, it is essential that the Title IX Regulations be adopted immediately with the athletic sections intact so that the advances which have been made are not lost. Women need these provisions to give them the effectiveness that male ahletes have had through their intercollegiate association. The efforts to control the athletic issues in Title IX by primarily male organizations devoted to the perpetuation of their specially-selected individual programs at the expense of the majority of all existent athletic activities (i.e, women's athletics and "minor" sports) must not be accepted as justifiable under the intentions of Title IX. The interests of one self-serving minority cannot be protected at the expense of the majority of persons on a campus and still remain consistent within the framework of Title IX. The provisions of 86.41 and other sections relating to athletics must be retained so that Title IX may be viewed by all persons as progressive and acceptable.

Self-Evaluation and Compliance

IAWS is extremely concerned that provision is not made in section 86.3 to assure that students will be a part of the self-evaluation mechanism at an institution. There is great fear that perhaps this area will need strengthening later, because it is quite easy for an institution conducting a self-evaluation, to determine they are in compliance with the regulations because of the way by which they have defined various aspects of the standards. It may become very easy to stretch a term (or ignore it completely) rather than admit that the institution does discriminate against women. Unfortunately, not all administrators share the "good faith concern" for providing women with an equal education and educational experience. Many are not even aware that their attitudes and policies are casting women into substandard roles and providing inferior opportunities.

With the guaranteed input of students on an evaluation committee, there is more likely to be a well-rounded evaluation made with all perspectives taken into consideration. It is unfortunate that administrators would not be totally objective, but the fact does exist in some situations. On one campus, a woman who did file a complaint against the university was strongly encouraged to find another campus for herself in the fall. That pressure was easier than for the university to accept the fact that vast changes in its regulations and housing structures will be needed to comply with Title IX.

Throughout the process of evaluation and grievance, students have very few options in terms of attempting to remedy discriminations. Under the proposed procedural regulations, if HEW does not happen to be planning a review of that campus within the next twelve months (even that would be long in terms of the transient nature of the student population), the student has the choice of taking the complaint to the school's grievance board for them to deal with directly—which is like a judge asking a person he has just convicted to clean his house, or the student can take it to the State Human Relations Court. This option is equally futile because, a) the student does not have the financial ability to do this and b) he does not have the time due to his short time at the institution and the time involved in litigation.

Provisions must be made for students to have a fair opportunity to hold the institution they are attending accountable for providing the quality education they are required by law to do.

These four areas have dealt with specific weaknesses we feel exist in the Title IX regulations. However, IAWS feels that it has expressed quite strongly that regardless of these points, the regulations must be accepted. The time was spent with these in the hopes that our opinions can be considered should future legislation come up or further hearings held. There are so many strengths in the Regulations which will mean finally that women will have the educational opportunities they deserve. Many areas of the regulations will probably have to be clarified in legislation, but I must stress that the efforts involved are well-spent.

The passage of these regulations and their implementation are fully appropriate for Congressional action. Allow them to go into effect July 21, 1975 so that women are not left without enforcement measures for obtaining their education. I thank you for your attention and your concern for providing educational opportunities equally for the women students of our country as men have enjoyed for years.

APPENDICES

Appendix A.—Section 86.34, Curricular Materials and Women's Studies.

IAWS has long been strongly in favor of the exploration of educational programs relating to the specific needs of women and to programs dealing with the status of women in our society. The following resolutions indicate our stands on these issues and serve as support for our recommendations on page 8:

1974—IAWS recognizes that the histories and achievements of women are virtually ignored in conventional textbooks, and that as women we must create viable solutions for other women to the societal forces that constantly force us into submissive positions. IAWS urges that better support be given for the speedy creation of women's studies programs as a tool for expanding our understanding and awareness of ourselves as women.

1973—IAWS urges all member organizations to investigate the possibilities of adding women's studies courses to their existing curricula to make available materials relating to and increasing the awareness of the status of women.

1972—IAWS urges member organizations to work within their respective institutions to see that materials of use to women for understanding themselves and their roles in society are infused in existing curricular offerings and that, as appropriate, new offerings in women's studies courses be added to the curricula.

In addition, IAWS actively endorsed the joint Statement on Women in Higher Education, 1973, which was prepared and endorsed by the American Association of University Women and eight other professional and educational associations. Item E of the First section, which deals with Education, covers the area of Curriculum. It states, "Every effort should be made to eliminate bias and distortion in the traditional curriculum. Until such time as existing biases in the curriculum are eliminated and information on the role of women in science, literature, government, etc. is thoroughly integrated in the overall curriculum, special programs, courses and materials deliniating the part played by women in society should be added to the curriculum."

Appendix B.—Section 86.34, Counseling materials.

IAWS has found that much of the counseling available to women, both in high schools and colleges, gears women toward traditional roles. (Results of IAWS 1974 Task Force on Career Education, prepared by Miami University of Ohio) It is most necessary that counseling personnel begin and continue to expose women and men to non-traditional careers in an effort to prepare them for life-styles to which they are best suited.

Again, we refer to the Joint Statement on Women in Higher Education, where in Item G of the Education section, the matter of Advising and Counseling is dealt with. It is stressed that women should be exposed to as broad a spectrum of career alternatives as possible. Furthermore, that training programs should be instituted to educate academic advisers and personal counselors about existing biases and stereotypes, in an effort to develop non-sexist counseling.

Appendix C.—Section 86.36, Health Services.

With regard to the proposals IAWS has made for this section, the following two positions, passed as resolutions at our 1973 National Convention, are appropriate Although one does not apply directly to campus health services, the intent is the same.

IAWS supports a national health security program that would include coverage of all women's health services, including voluntary family panning services, abortion, infertility, maternal care, and other fertility-related services, without regard to age, marital, or economic status.

IAWS supports and encourage the existence of Self-Help programs with regard to women's health on college campuses and in communities across the nation.

The need for such provisions, as we have suggested, are again pointed out in the Joint Statement, Item J., Health Services. The following four points are made:

a. If an institution provides health care for students, no special fees should be charged for routine gynecological services.

b. Health services should include information and counseling regarding the reproductive process and resources available within the community.

c. Student insurance plans should include coverage of medical services related to pregnancy and childbirth.

d. Leaves of absence for pregnancy or childbirth should be granted on no different basis than leaves of absence for any other temporary disability.

Appendix D.—Section 86.38, Athletics.

The 1974 resolution referred to states:

The Intercollegiate Association of Women Students reaffirms its support of Title IX of the Education Amendments of the 1972 Higher Education Act. IAWS strongly reiterates the necessity for immediate issuance of comprehensive guidelines for enforcement procedures, specifically including provisionse for equal opportunity for women and men in athletic programs.

Appendix E.—Section 86.13. Admissions into military institutions.

The 1974 IAWS convention body also passed the statement reading:

IAWS strongly supports the admission of women students into our national military academies.

Military service offers many benefits to persons, which because most service academies have not admitted women, until recently, and because the amount of participation of women in the armed services of our nation has been restritced by Congressional legislation and higher standards set for women, have been denied to these women. Among the benefits are: free and low-cost medical services, opportunities for higher education, job training skills at the expense of the government, special consideration when applying for Civil Service jobs, and the "status" or "honor" given those who have "served their country," a consideration particularly important to politicians. Furthermore, military service has provided many with a means to improve themselves or pull themselves out of a poor socio-economic background. Women, for the most part, are denied these privileges. Studies have shown, and in testimony presented by IAWS on the Equal Rights Amendment before Subcommittee No. 4 of the Committee on the Judiciary of the House of Representatives in 1971 (pages 599–601 of those records) was so stated, that nine out of ten jobs done by servicemen are civilian jobs. Therefore, the military could continue its policy of personnel doing the jobs for which they are best suited—male or female.

Women should not be denied such opportunities available through military service, and by opening military academies up to the women who desire to take advantage of such options, this area of sexism in education can be eradicated in the spirit guiding Title IX.

In 1971, the IAWS convention body stated that,

Given whatever selective service system prevails, IAWS supports the involvement of women equally with men in the responsibilities, requirements, and rights inherent in that system.

These are the women of age to be eligible for military service, and while not all may agree with the policies and practices of the armed services or their academies, those who do should be afforded the opportunity to participate.

Mr. O'Hara. Thank you very much.

You make an excellent point with respect to the importance of institutions taking some scientific measures and steps to determine the degree of interest in a particular sport. Leaving that out of the regulations is probably not a good idea.

I was also interested in your comment with respect to single-sex activity organizations.

One of the other witnesses before the committee a couple of days ago indicated a very strong feeling on that subject against single-sex honorary societies, for instance, on the grounds that membership in an honorary society had something to do with the kind of job you might have and how much you might get paid after you left school and I am sure you took that into consideration.

Ms. Mack. We certainly did.

Mr. O'Hara. But nevertheless, you feel on balance there are more advantages in permitting single-sex organizations?

Ms. Mack. Yes, realizing our primary concern is as to specific women's organizations that provide educational programs on the campus. Our major concern is not with honorary organizations. We don't feel this is our role in terms of defining whether or not they are appropriate.

Mr. O'Hara. Mr. Eshleman, any questions?

Mr. **Eshleman.** Thank you, Mr. Chairman.

Ms. Mack, I agree with your philosophy on the single-sex professional organizations and would the same carry over that single-sex sport participation in most instances would be permissible then also if single-sex professional organizations remain permissible?

Ms. **Mack.** We are not suggesting that single-sex professional organizations do, be, or are maintained.

Mr. **Eshleman.** You want them abolished?

Ms. **Mack.** The professional organization, yes.

Mr. **Eshleman.** Single-sex professional organizations?

Ms. **Mack.** Right, specifically for the comments which I believe the committee heard in terms of the fact that for many of these organizations they are determinant of whether or not a person gets a job.

Mr. **Eshleman.** I misunderstood. You want the abolition of single-sex professional organizations on campus?

Ms. **Mack.** I think that would be the general feeling of the organization.

Mr. **Eshleman.** Now, I would like you to address yourself to this. I have not been able to make all of the hearing, but I understand this was not brought up too much. I believe maybe we are all being a little hypocritical here, and I include myself. I include myself more so than you.

If we are going to talk too much and stretch equality why don't we talk more about intramural sports, because here we are talking equality and talking equality about only 5 percent of the student body who participate in interscholastic sports and not much more than that, maybe 10 percent at most. Nobody is addressing themselves to 90 or 95 percent. It seems to me kids without too much coordination are entitled to sporting activity, too.

If we are going to talk equality, let's talk equality 100 percent. Especially if we are going to use tax dollars—if we are going to use tax dollars, let's take a more important look at intramural sports and I would like you to address yourself to that.

Ms. **Mack.** I certainly agree with you on that point. I don't think the point we raised in this testimony, or points are limited to intercollegiate and interscholastic events.

Another factor that comes in often, the women's organization on the campus is the group running the intramural program for women. I know on my own campus there is a remarkable increase in the last year of the number of women participating and I think the opportunities they have is a very real need.

Mr. **Eshleman.** Wouldn't this be true, if they did start to emphasize intramural sports more, it would be easy to have equality in intramural sports?

Ms. **Mack.** I think it almost happens inherently with the extension.

Mr. **Eshleman.** What is causing the problem is the interscholastic sports, and I go back to where I started, that we are only talking about 5 percent and ignoring 95 percent of the student body.

Ms. **Mack.** But the 95 is taken care of, we assume that if more attention is placed on those people in their intramural activities it would create some participation by them.

Mr. **Eshleman.** With your familiarity with the college campus, what percentage of the ticket money—the ticket revenues—what percentage of that is given to intramural sports? Can you make a guess on that?

Ms. Mack. I really could not say.

Mr. Eshleman. Do most colleges give some of it toward intramural sports?

Ms. Mack. I really cannot answer that question.

Mr. Eshleman. That is all I have, Mr. Chairman.

Mr. O'Hara. Thank you very much, Mr. Eshleman.

I think that just as sort of responding to that last line of questioning, I think there is a lot to be said for deemphasizing intercollegiate sports activities. Of course, that is not what the statute got into, you know.

Ms. Mack. Yes, Mr. Chairman.

Mr. O'Hara. What we were simply trying to do was equalize opportunities on the basis of sex. My own personal feeling about intercollegiate sports is they have an emphasis that I think is detrimental to the education program and that there ought to be a great deal more emphasis on intramural sports, but that is neither here nor there in terms of this current set of hearings. I don't think we are here to protect them or to abolish them or anything else.

We are just here to try to figure out what, in terms of the situation as we find it, constitutes an equal opportunity on the basis of sex. I think there are some real problems in that.

Ms. Mack. I would concur with that.

Mr. O'Hara. Thank you very much for coming here before us. I am sure you will be watching our actions with interest.

Mr. O'Hara. Our next witnesses is Bernice Sandler, appearing on behalf of the Association of American Colleges.

Ms. Sandler. I would like to call on Margaret Dunkle, associate director of our project, because I rely on her advice if it is needed.

I would ask that the full statement be printed in the record so I don't have to read the entire document.

Mr. O'Hara. Without objection, the complete statement of both the last witness and yourself will be printed at appropriate points in the record.

[The statement referred to follows:]

Prepared Statement of Dr. Bernice Sandler, Director, Project of the Status and Education of Women,[1] Association of American Colleges, Washington, D.C.

I am Dr. Bernice Sandler, Executive Associate Director at the Association of American Colleges and Director of the Project on Status and Education of Women. The Association of American Colleges is composed of approximately 700 member institutions concerned with undergraduate liberal education. The majority of our members are private institutions, many of which are church-related.

I am also a member of the HEW Office of Education's Advisory Committee on Women's Educational Programs. Formerly I was Chair of the Action Committee of the Women's Equity Action League (WEAL), which was instrumental in bringing about federal enforcement of Executive Order 11246, which prohibits sex discrimination in universities and colleges holding federal contracts. I also testified before this committee in 1970 when Representative Edith

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[1] AAC's project on the Status and Education of Women began operations in 1971 under grants from the Carnegie Corporation of New York, the Danforth Foundation and the Exxon Education Foundation. The Project provides a clearinghouse of information concerning women in higher education, and works with institutions, government agencies, and other associations and programs.

Green held hearings on the bill that eventually became Title IX of the Education Amendment of 1972. Later I was employed by this committee as an Education Specialist to compile the printed record of those hearings. As such, I believe I was the first person ever hired by any Congressional committee to work specifically in the area of women's rights.

The 92nd Congress articulated a clear national policy to prohibit sex discrimination at all levels of education when it enacted Title IX of the Education Amendments of 1972[2] and several other laws. In March of 1972, Title VII of the Civil Rights Act of 1964 was amended to prohibit discrimination in employment in all educational institutions, public or private, whether or not they receive federal funds. The Equal Pay Act of 1963 was amended to include administrative, professional and executive employees, so that women faculty are covered by that act. Titles VII and VIII of the Public Health Service Act were amended to prohibit discrimination on the basis of sex in admission to training programs for the health professions which receive funds through that act. The Equal Rights Amenment was also passed by the 92nd Congress—an amendment that would, among other things, clearly strengthen constitutional protection against sex discrimination in publicly financed education programs. Additionally, the U.S. Commission on Civil Rights was given authority over the area of sex discrimination, so that its charge now includes evaluating the government's progress towards eliminating discrimination against females. Thus the Congress has recognized the serious implications for the nation of denying equal opportunity in education and employment to women and girls, and has taken numerous steps to implement the national policy to end such discrimination.

Although Title IX has been *in effect* since July 1, 1972, HEW has taken an unprecedented three years to write the regulation to finally implement the law. The regulation was signed by the President and sent to the Congress on June 4, 1975. Unless the Congress rejects the regulation, it will go into effect on July 21, 1975. Under a provision of the Education Amendments of 1974, Congress may reject the regulation if it believes that it is inconsistent with the statute.

Thus, my testimony today will focus on the issue of whether or not the regulation is consistent with the legislation. Whether the regulation contains portions that could be written in a better manner, whether the regulation is too strong or too weak, whether one likes or dislikes the regulation, or whether one opposes the basic legislation—these are not appropriate items to take into consideration in deciding whether the regulation is consistent or not.

The main opposition to the regulation stems from its coverage of athletic programs. Two basic questions need to be examined:

> Are athletics covered by the Title IX mandate for equal opportunity even though they receive no direct federal funding?
>
> If discrimination in athletic programs is indeed covered, are those parts of the regulation that deal with athletics consistent with the legislation?

I. Are Programs and Activities Not Directly Receiving Federal Funds Covered by Title IX?

Title IX reads:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance.*"[3] (Italic added.)

The question of what constitutes a program or activity becomes a critical one in interpreting the proper scope of Title IX. Does "program or activity" mean ONLY those programs and activities which receive federal monies, or does "program and activity" refer to *all the programs and activities of an educational institution receiving federal funds?* The statute itself provides no direct guidance to the answer to this question. The Title IX regulation interprets the prohibition against discrimination to apply to all programs and activities of the institution.[4]

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[2] Education Amendments of 1972 § 901-907, 20 U.S.C. §§ 1681-86 (1972).

[3] Education Amendments of 1972 § 901(a), 20 U.S.C. § 1681 (1972). Certain schools are exempt from all or part of the statute. For a discussion of these exemptions, as well as a summary analysis of Title IX, see Margaret C. Dunkle and Bernice Sandler, "Sex Discrimination Against Students: Implications of Title IX of the Education Amendments of 1972," 18 *Inequality in Education* 12 (1974).

[4] Subpart B, Section 86.11 of the regulation provides that, with certain exceptions dictated by the statute, the nondiscriminatory requirements of Title IX apply "to every recipient and to each education program or activity operated by such recipient which receives *or benefits from* Federal financial assistance." (Italic added.)

If "program or activity" is interpreted narrowly to mean *only* those programs or activities directly funded by the federal government, an institution would be free to discriminate in *all* areas of its programs *other* than those which receive federal aid. Such an interpretation would severely restrict the impact of Title IX and would be contrary to the legislative history and purpose of the statute. For example, a department of economics would be able to prohibit or limit admission of females to its program while a department of biology in the *same* institution which received federal monies would have to be nondiscriminatory in its program.

Similarly, a school could not discriminate in a building that was federally financed but could conduct the discriminatory activity in a next door building that was built without federal funds. Thus, a school could discriminate in any area where it does not receive direct federal funding, and it could do so without fear of loss of federal funds.

Although there are no cases as yet under Title IX to aid in the interpretation of "program or activity," the identical language in Title VI of the Civil Rights Act of 1964[5] has been interpreted in *Board of Public Instruction of Taylor County* v. *Finch*.[6] The court held that Title VI did not intend wholesale cutoffs of Federal aid: rather it requires a case by case determination of those activites which might be discriminatory.

Some persons who disagree with HEW's interpretation of Title IX (and Title VI) are citing *Taylor* v. *Finch* as justification for limiting coverage only to those activities that receive direct federal assistance. However, *Taylor* v. *Finch* dealt with the question of whether discrimination in *one* federally assisted program could automatically result in *termination* of *all* federal funds even though there had been no finding of discrimination in other programs. (*Taylor* v. *Finch* focuses on the scope of the *remedy* for discrimination in terms of which funds should be terminated; it does not deal *directly* with the question of whether or not discrimination is prohibited in all programs and activities of the institution.) Nevertheless, the court specifically ruled that illegal discrimination in one part of the school system does not *automatically* "infect the whole": "each program receives its own 'day in court.'" At the same time, however, the court clearly supported the concept that *discrimination in one part* of the school system *could* indeed "infect the whole":

> "The administrative agency seeking to cut off funds must make findings of fact indicating *either* that a particular program is itself administered in a discriminatory manner, or *is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory*." (Italic added.)

Such discrimination, in a program that did not receive direct Federal funding, could "infect the whole" by causing a chilling effect on applicants to the institution and thereby diminishing the number of persons participating in the federally assisted programs within the institution.

Taylor v. *Finch* specifically allows for the possibility that sanctions could be used to prevent discrimination in activities that are not themselves the direct recipients of federal aid precisely because federally assisted programs can be thereby "infected by a discriminatory environment." By requiring "separate consideration of the use or intended use of federal funds," and disallowing wholesale cutoffs by HEW to *all* programs, the court made clear that its aim was to protect "innocent beneficiaries of programs *not* tainted by discriminatory practices." *There is no language in the decision that in any way condones discriminatory practices in non-federally assisted activities which affect students in programs aided by the federal government.*

A second case, *Bob Jones University* v. *Roudebush*,[7] which was upheld on May 28, 1975 by the U.S. Court of Appeals for the Fourth Circuit, also supports the principle that discrimination in all programs of the institution are covered. The university, because of its religious beliefs, discriminates against blacks in admissions. It receives no direct federal funds and is supported by student payments and gifts. The court concluded that veteran's benefits were indeed federal assistance under the meaning of Title VI, and that *Bob Jones conducts a program or activity within the meaning of Title VI.*

. . . payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would, in the absence of federal assistance, be spent on the student. Analogously, Bob Jones' participation in the HEW-administered National Defense Student Loan Program (NSDL) relieved the university from the burden of committing its assets to loans to eligible students (footnotes omitted)."

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[5] Civil Rights Act of 1964, 42 U.S.C. § 2000d(1). Title VI prohibits discrimination on the basis of race, color or national origin in all federally assisted programs. Title IX was patterned after Title VI; the legal sanctions for noncompliance are identical under both statutes.

[6] 414 F. 2d 1068 (5th Cir. 1969).

[7] *Bob Jones University* v. *Richard L. Roudebush*, Administrator of Veteran's Affairs, —— F. Supp. —— (D.S.C. 1974), affirmed May 28, 1975, 4th Circuit.

The court denied any veterans benefits from being funneled in any way to an institution which discriminated, even though the institution did not receive direct funding; it did not in any way suggest that only those portions of veteran's benefits which were spent on strictly educational programs be withheld.

The court, in talking about veteran's educational benefits, stated the principle that, whether cash payments are made to a university and thereafter distributed or given to veterans directly "is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in any event." The same reasons would apply to student loans and other forms of indirect assistance. The court also stated that "Bob Jones conducts a program or activity within the meaning of Title VI," and that "Bob Jones' educational program receives federal assistance."

Student loans and revenue sharing funds, like veteran's educational benefits, are *general funds* which can be spent by the institution in a variety of ways. If discrimination is prohibited *only* in those programs or activities which receive *direct* federal assistance, institutions would have to account for the *exact* spending of loans, etc., and would be able to divert them from discriminatory activities to program areas that did not discriminate while allowing blatent discrimination to exist elsewhere in the institution. This would obviously subvert the purpose of the Act. It is clear that such general funds as well as direct programmatic assistance often enable institutions to support numerous other school activities, such as athletic programs and extracurricular activities.

In the absence of precise statutory language or legislative history, courts look at the aim of the legislation: in this case, to end discrimination. A narrow interpretation of the statute to exclude programs not receiving direct federal assistance would be inconsistent with the aim of ending discrimination. Moreover, the legislative history *is* precise in indicating the intent to cover *all areas* of a school's activities. Senator Bayh, sponsor of Title IX in the Senate, stated on February 28, 1972 on the floor of the Senate that:

"... we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available *services* or studies within an institution once students are admitted, and discrimination in employment ... *in the area of services, once a student is accepted we permit no exceptions.*" (Italic added.) (*Congressional Record,* Feb. 28, 1972, S2753).

Surely the Congress did *not* intend to initiate a federal policy of giving federal assistance to an institution which discriminates in *some* areas although not in others. *To do so would be to extend benefits to male students that could not be extended to female students.* An interpretation that Title IX only applies to *part* of a school's activities might well put both the school and the federal government in violation of the 14th Amendment, to the extent that the government is a joint participant in the discriminatory activity. The Constitution *requires* that the Federal government ensure equal opportunity in projects it finances directly or indirectly. Under the Due Process Clause of the Fifth Amendment, the federal government cannot provide direct grants to public or private entities which discriminate on the basis of race.[8] It is likely that the courts would make a similar determination on the basis of sex. It would be both awkward and unusual for Title IX to allow what may indeed be constitutionally prohibited.

Except for specific exemptions, the language of Title IX is virtually identical to that of Title VI. Under Title VI, the courts have consistently considered sports to be an integral part of the school's program or activity and thereby covered by Title VI.[9] If Congress had meant to distinguish between race and sex discrimination in athletics, it would have done so, as it indeed did in the area of admissions, where Title IX has exemptions and Title VI has none. Certainly the identical language which appears in both Title VI and Title IX cannot mean one thing when race discrimination is involved and mean something very different when sex discrimination is involved. The standard concerning what constitutes discrimination should not be *less* for women than it is for minorities.

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[8] See, for example, *Gautreaux v. Romney*, 448 F. 2d 731 (7th Cir. 1971); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Bossier Parish School Board v. Lemon*, 370 F. 2d 847 (5th Cir. 1967); *Green v. Connally*, 330 F. Supp. 1150 (1971) *aff'd mem. sub nom., Coit v. Green*, 404 U.S. 991 (1971).

[9] See, for example, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971); *United States v. Jefferson County Board of Education*, 372 F. 2d 836 (5th Cir. 1966), *affirmed en banc*, 380 F. 2d 385 (5th Cir. 1967) *cert. denied sub nom.; United States v. Cado Parish Board of Education*, 389 U.S. 840 (1967).

An analysis of the legislation and case law which was prepared by the Congressional Research Service of the Library of Congress supports the interpretation that discrimination in all programs and activities is prohibited by Title IX in those institutions receiving federal funds. A similar conclusion was reached by the American Civil Liberties Union and the Center for National Policy Review at the Law School of Catholic University.

II. Did the Congress Intend to Cover Athletics When It Enacted Title IX?

It is often stated, erroneously, that the Congress did not intend for athletic programs to be covered by Title IX. However, the legislative history specifically indicates the intent of the Congress to end discrimination in all phases of education, including sports. Senator Bayh specifically mentioned sports in his statement on February 28, 1972 (*Congressional Record*, S2747); speaking of instances where differential treatment by sex might be allowed, he said:

"These regulations would allow enforcing agencies to permit differential treatment by sex only—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, *in sports facilities* or other instances where personal privacy must be preserved." (Italics added.)

Thus the legislative history reflects the *intent* of the Congress to prohibit discrimination in sports. Moreover, the Congress did enact several exemptions (such as military schools and a partial exemption for housing); if it had meant to exempt athletics, it would have done so. The intent of Title IX is to provide equality of opportunity and equal access to instruction, facilities and all other aspects of all programs conducted by educational institutions receiving federal monies.

Congress did not—nor could it have been expected to—specifically detail every single area of coverage. It did, however, enact several exemptions, and athletics is *not* one of these. The enactment of these exemptions explicitly means that *all areas NOT exempted are thereby covered by the statute.*

This interpretation of Title IX and its coverage of athletics is further confirmed by the "Javits Amendment," Section 844 of the Education Amendments of 1974 which ordered HEW to prepare regulations implementing Title IX ". . . which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." The language of this section is more than clear: *it confirms the intent of the Congress that Title IX does indeed cover sports.*

III. Assuming that Coverage of Athletics Is Mandated by Title IX, Is the Regulation Consistent With the Legislation in the Manner in Which It Covers Athletics?

Perhaps the most controversial area that Title IX covers is that of athletics. Here the discrimination against females is perhaps the greatest, certainly in terms of the differences in the amount of money spent on each sex and in terms of clearly overt discriminatory policies and practices. No other issue under Title IX has generated as much heated debate and controversy as equality in sports and athletics.

Apart from the pressures of the organized male athletic hierarchy, the athletics issue is one of the most difficult to deal with. More than most areas of our educational system, athletics and physical education reflect the essence of our most stereotyped cultural expectations: men are "supposed" to be strong and aggressive; women are "supposed" to be weak and passive. Girls and women have generally not been encouraged to participate in physical activities because the traits associated with athletic excellence, such as achievement, self-confidence, leadership, and strength, are often seen as being in "contradiction" with the expected role that females are "supposed" to play.

Another difficulty in dealing with the sports issue is that the legal precedents are far from clear. In almost all other areas of discrimination, the precedents and principles developed by the courts in race discrimination cases can readily and easily be applied to sex discrimination problems. Because of the general physical differences between men and women as a whole, the principles developed in other discrimination areas do not easily fit athletic issues, particularly in the area of competitive sports, where the issue of single sex teams and integrated teams is a difficult one to solve. "Separate-but-equal," which is a discredited legal principle in terms of civil rights, *may* have some validity when applied to some areas of competitive athletics, but it is by no means clear *how* and in *what* circumstances involving competitive athletics this principle should be applied. The legal principles are only now beginning to be articulated in the courts as this is a relatively new area of litigation. It simply cannot be said with any certainty that "equality of opportunity" would best be attained by one procedure rather than by another. (Our Project's paper, *What Constitutes Equality for Women In Sport?* which is attached, deals with some of the methods suggested by various groups as means to achieve equality.)

In general the Title IX regulation is *weaker* than current case law would mandate.[10] However, no matter what position the HEW regulation adopts on sports, it is almost inevitable that the courts will mandate changes in the next few years as they shape the standards for equality in this area. It is also equally certain that there is no way that HEW could have drafted regulations for athletics that would be acceptable in large measure to most of the interested parties. We need time to experiment, to test our various approaches and to let the courts shape the doctrine of equality in sports.

IV. Does Title IX Mandate An Exemption of Intercollegiate Athletics and/or Revenue Producing Sports?

The regulation makes no distinction between sports which produce revenue and those which do not. Opponents of this athletic coverage in the regulation claim that the Congress did not mean to cover intercollegiate athletics and/or revenue producing sports. However, there is nothing whatsoever in the statute or the legislative history to mandate or allow the exemption of either intercollegiate athletics or revenue producing sports. Indeed, the Congress *explicitly rejected this approach* when it defeated the "Tower Amendment" to the Education Amendments of 1974 which would have specifically exempted revenue producing sports. If the Congress had meant to exclude revenue producing sports it did not do so when it passed Title IX. When it had a second chance to do so, it refused by rejecting the Tower Amendment.

Were intercollegiate athletics and/or revenue producing sports to be exempted, the following inequities could occur (all of the examples below are from actual institutions. The names have been omitted because these institutions are no worse than any others; the problem is widespread throughout academia.):

1. *Any institution could fall under the exemption by merely charging a nominal fee at all intercollegiate events, even those that were traditionally free. Students, male and female, could be forced to subsidize all male intercollegiate sports by having the fee for admission incorporated into a compulsory "activities fee."*

> At one institution, student activity fees "automatically" but admission to men's intercollegiate events. The money is treated as "revenue" for those sports.
>
> Of $68,000 raised by student fees for athletics, only $5,000 was allocated for women's athletic programs, even though the student body was approximately half female.

2. *An institution could have a substantial intercollegiate program for males and none whatsoever for females.* It could claim that "financial exigency" prevented the development of women's intercollegiate programs.

> One mid-western university spent over $2,600,000 on its men's intercollegiate athletic program. No university money was officially spent on women's intercollegiate athletics.
>
> In one state university, the men's athletic program is funded as a line item in the regular budget; the women's program competes with the chess club and other extracurricular activities for a small share of the student activities fee.
>
> A western university has long-range obligations of $4,277,475 for capital improvements: obligations for the football, field, track and a combination dormitory and golf facility total more than $600,000. Despite losses over the past three years of $62,000, $92,000 and $22,000, budget adjustments were made in order to provide a *total of $1,500* for women's athletics for the current semester.

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[10] See, for example, *Brenden v. Independent School District 742*, 342 F. Supp. 1224 (D. Minn. 1972); *Reed v. Nebraska School Activities Association*, 341 F. Supp. 258 (D. Neb. 1972); *Haas v. South Bend Community School Corporation et al.*, No. 1071 S309 (Indiana Supreme Court, 1972). For a ruling in the other direction, see *Bucha v. Illinois High School Association*, 351 F. Supp. 69 (N.D. Ill. (1972).

At another institution, women's sports received only $18,000, or *nine tenths of one per cent* of the institution's two million dollar budget, even though over 40% of the student undergraduates were female.

3. *All facilities used for revenue producing sports could be restricted to males, or given low priority to female usage.* Female teams could be allowed to use the facilities only when the men's teams were not using them.

The women's varsity basketball team at one New England college could practice in the gym *only* when the men did not want to use it.

At many institutions, women's teams must practice at odd hours, such as after dinner on weekends or before breakfast on weekends.

4. *A donor could give money for a new gymansium or swimming pool earmarked for male intercollegiate activities and practice.* Women could be prohibited from access to these facilities (or given limited access) *even if there were no other facilities* available for women. (see examples under No. 3 above.)

5. *All intercollegiate athletic scholarships could be limited to men only, with none whatsoever allocated to women.*

Until the Spring of 1973, under the rules of the Association for Intercollegiate Athletics for Women (AIAW), females participating in intercollegiate sports were prohibited from accepting scholarships. Very few colleges and universities have scholarships for women athletes. Thus, although there are scholarships for males participating in swimming, basketball, etc., women participating in the identical intercollegiate sports have no such aid available to them.

Institutions could legally attempt to "attract" donors for male scholarships only, without any effort to attract money for women's scholarships whatsoever.

6. *Equipment*, such as practice uniforms, tennis racquets, etc. *could be provided for men's teams but not for women's teams.*

Women's teams often have inferior equipment or the left-over equipment no longer needed by men's teams when new equipment is purchased.

Typically, when a new gymnasium is built, the old one is retired to the women.

7. *Team doctors could be available for male athletes but not for women athletes* who would have to pay for their own medical care if injured.

At some institutions, the health service provides team doctors for male varsity athletes but not for women athletes.

At one institution, a woman athlete who injured her knee could not use the ultrasonic therapy machine available for injured male athletes.

8. *Men athletes could have special dormitories, special high protein diets; women athletes could receive no such special attention.*

9. *Male athletes could be covered by special insurance programs, but not women athletes.*

Many institutions provide special insurance programs for their male athletes but not for women athletes.

10. *Travel for men's teams could continue to be subsidized at a high level* (chartered buses and airplanes) *while women's teams travel at their own expense.*

At one institution, women's teams sold apples during football games to pay for their travel and other expenditures.

At another institution, women sold Christmas trees to raise money for their expenses.

At some institutions, women's teams sell cookies and cakes to pay for travel expenses, while the men's teams travel in chartered buses or in first class service in airplanes.

11. *Meals and lodging for male athletes while traveling to games could continue to be subsidized while women athletes have to pay for their meals and lodging out of their own pockets.*

Many women's teams have no money allocated for *per diem* expenses while away at games. Often the women bring their own sandwiches and sleeping bags.

12. *Budgets to recruit athletes could be limited to male athletes only.* Few, if any, women's teams have funds for recruiting women athletes.

13. *Budgets for publicity could be allocated totally for male intercollegiate activities, with none allocated for women's intercollegiate athletics.*

Many institutions have a budget for public relations for men's athletics. Women's athletics receive little attention in the press as a result.

14. *Women reporters could be excluded from the press box during male intercollegiate events.* Because these women do not work for the university or college, employment discrimination laws would not apply.

15. *ALL employees who worked in activities or facilities involving intercollegiate athletics (coaches as well as maintenance people) would be exempt from the protection of Title IX*, which covers *employees* as well as students. Although other employment laws would apply, these particular employees would be denied remediation under Title IX, a remedy which is available for all other educational employees.

Some persons are claiming that the Title IX regulation will control the use of donated funds, use of generated income, the kind of program to be conducted and the allocation and qualifications for scholarship assistance in athletic programs. This argument distorts the impact of the regulation: institutions may indeed conduct any kind of program they wish. The only restriction is that they not discriminate on the basis of sex in the type of program they choose to conduct. The government does not in any way mandate the type of program an institution would have to have; it only mandates that the opportunities that exist for one sex be available to the other sex as well. These programs do not have to be "strictly equal"; obviously there may be different interest levels for each sex.

An exemption for revenue producing sports would essentially say that discrimination against girls and women is legal and justifiable when it is profitable, and that discrimination is prohibited ONLY where money is not involved.

V. Did the Congress Intend Title IX to Mandate Coeducational Physical Education Classes?

The regulation requires integrated physical education classes but allows separation of the sexes during activities involving contact sports. Additionally, if a school has classes dealing with human sexuality, it may conduct separate sections for each sex.

Persons opposed to the Title IX regulation claim that the statute was not intended to cover coed physical education classes. They claim that there is no justification for this in either the statute or the legislative history.

As noted earlier, the legislative history does mention "sports facilities." Moreover, the coverage of physical education classes should come as no surprise to anyone who read the hearings held before this committee by Rep. Edith Green in 1970. The bill before the Committee at that time was almost identical to what eventually became Title IX (although it amended Title VI directly) and did not contain any exemptions at that time. Approximately 5,000 copies of those hearings were printed; two copies went to each member of the House, and one copy was sent to every Senator.

At least three witnesses during those hearings pointed out to the Committee that the bill (then Section 805 of H.R. 16098) would have an impact on this area. Jerris Leonard, then Assistant Attorney General, Civil Rights Division of the Department of Justice, testified on July 31, 1970, asking for an amendment which would allow sex a bona fide basis for different treatment.[11] He noted that such an exemption would permit, among other things, "separate dormitories and *separate gymnasiums*." (Italic added.) *The Congress did indeed enact a separate provision allowing for separate housing; it did NOT enact any provision for separate gymnasiums.*

Similarly, on July 1, 1970, the Honorable Frankie M. Freeman, Commissioner on the U.S. Commission on Civil Rights, noted that, among other things, the bill would require that "as a condition for Federal aid, all housing owned and operated by an institution, *including the use of such facilities as gymnasiums* and lounges, be available to persons of both sexes."[12] (Italic added.)

Dr. Peter Muirhead, Deputy Assistant Secretary and Associate Commissioner for Higher Education, Office of Education, HEW, testified on July 1, 1970 that the amendment would cover "programs which might be limited to one sex, such as recreational and *physical educational activities*."[13] (Italics added.)

Thus this Committee had every opportunity to amend the proposed bill to exclude athletics and physical education. That it chose not to do so is accurately reflected by a lack of exemption in the Title IX statute and in the subsequent regulation.

The question of coverage of physical education classes is now before the Congress in the form of the "Casey Amendment" which in effect forbids HEW from requiring schools to have integrated physical education classes. Thus the Congress has an opportunity to directly vote upon this matter.

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[11] Hearings Before the Special Subcommittee on Education of the Committee on Education and Labor, House of Representatives, 91st Congress, 2nd Session, on Section 805 of H.R. 16098, June and July 1970, Part 2, page 678.

[12] Ibid, p. 664.

[13] Ibid, p. 650.

An exemption for physical education classes would raise serious questions about equity for female students. *Schools could designate any part of their athletic program, including extracurricular activities and competitive teams, as credit or non-credit "physical education classes," and thus exclude females from virtually all such activities.*

A school could label all intra-mural, interscholastic or intercollegiate athletic teams as "physical education classes" limited to males only, and give preference in the use of facilities and equipment to those persons who are enrolled in the "class."

Women majoring in physical education could be denied access to specific courses in the physical education department. If the number of women who wanted a particular class was small in number, the school could claim that it did not provide the instruction because there was "not enough interest" for a separate class. Thus females could be deprived of entry into all "male" physical education programs; HEW would be powerless to require their admission into such classes.

Any school could thereby exclude females from access to programs and activities by using an "alternate" excuse, such as lack of money or interest for setting up separate programs for females.

One need only look at any playground, school yard or picnic ground to notice that boys and girls, young men and women do indeed play many sports together, and that "integrated" physical education classes are not likely to be as disastrous as critics claim. Many schools, as a matter of economics and in anticipation of the Title IX regulation, have already integrated their physical education programs with little disruption or difficulty. The time limits allowed by the regulation (one year for elementary schools, three years for secondary and post-secondary institutions) should also smooth the transition to integrated classes.

VI. Additional Issues Being Raised by Opponents of the Regulation.

As well as the issues discussed above, Senator Jesse Helms (D., N.C.) has raised several other areas in his resolution to reject the Title IX regulation, which was introduced in the Senate on June 5, 1975. He notes that the regulation(s) "declare that pregnancy must be treated as a temporary disability such as a broken leg." [14] The Senator seems unaware of Title VII of the Civil Rights Act. The Sex Discrimination Guidelines for that act *require* that pregnancy be treated as a temporary disability, such as a broken leg. [15] *Even if the Title IX regulation were rescinded, the Title VII guidelines would still apply.* Also, if unwed mothers are excluded from further training and schooling, it is virtually certain that they and their offspring will be condemned to lives of poverty and ignorance, with little alternative to joining the welfare rolls.

Senator Helms also notes that:

"While it was the obvious intent of the statute that it apply to those seeking an educational opportunity, the regulations (sic) cover the *employees* of educational institutions, whether they be maintenance personnel, administrative staff or teachers. *Again, the regulations are inconsistent with the congressional enactment.*" (Italics added.) [16]

A reading of the legislative history and the conference report indicates that the House version of Title IX had a provision *exempting* employment; the Senate version did not. During the conference, the House receded, and the exemption for employees was dropped. *Thus the coverage of employees is clearly mandated by the legislative history of the act.*

Senator Helms has stated that he opposes the provision requiring nondiscrimination in health insurance policies and benefits. He adds, "Obviously the draftsmen (sic) of this regulation envision a school providing single students with family planning services and at the taxpayers expense, no doubt." [17] The regulation (Section 86.39), however, does *not* mandate family planning services. What it does mandate is that *IF* the institution provides them, it must provide them to both sexes. *IF* the institution provides *full* health care, as is provided in some post-secondary institution, then, and only then, must it include gynocological services. Thus an institution could not provide urological services for males and cover all other illnesses and disabilities with the exception of "female related disorders."

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[14] *Congressional Record*, June 5, 1975, S9714.

[15] *Guidelines on Discrimination Because of Sex*, the Equal Employment Opportunity Commission, 29 CFR 1604.10.

[16] *Congressional Record*, June 5, 1975, S9714.

[17] Ibid.

The Senator notes that, "The language of the statute is clearly prospective in nature. But the regulation requires affirmative action to remedy the effects of supposed past discrimination."[18] This, too, he describes as being inconsistent with the statute. Yet the regulation clearly does *not* require affirmative action to remedy *supposed* past discrimination. What is required is that the institution *conduct a self-study* and *modify policies* which have been discriminatory. Section 86.3(c) requires a self-evaluation by the institution which requires it to "modify any of these policies and practices which do not or may not meet the requirements of this part" and to "take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies or practices." Preference is specifically prohibited by the statute; in contrast, appropriate remedial steps might include actions such as additional recruiting materials to encourage women to become engineers or scientists; posters to encourage young women to take vocation courses; notification to students of both sexes as well as personnel to inform them of changes in policy; and the development of new procedures to ensure that no student, male or female, is denied the opportunity to participate in the school's programs because of their particular sex. No numerical goals are required.

VII. Coverage of Honorary Societies

The Title IX regulation does not allow single sex honorary societies to exist on a campus when they receive significant assistance from the recipient (86.31(b)(7)). Some persons are claiming that Title IX should not cover the membership practices of these societies and that such coverage was not intended by the Act.

Many professional groups have single sex honorary societies which often have student members. For example, the international business fraternity, Delta Sigma Pi, limits its membership to males only, and has chapters at practically every institution which has a school of business or economics or gives courses in these areas. They also maintain alumni clubs. The organization states that it offers "programs of professional and social activities designed to benefit all business and economic majors. *Women students cannot partake in these activities.*

Such organizations serve a crucial role in helping new and prospective professionals learn the ropes of their profession; essentially these organizations strengthen the "old boy" network whereby jobs are referred to "friends," news of the profession is disseminated, etc.

To a large extent, women have been excluded from this informal network perpetuated by single sex honorary societies. Where there are two such organizations, one for women and one for men, the men's organization is far more prestigious and usually larger—there are far fewer chapters of the women's groups.

Where professional honoraries exist for the betterment of women, such as an honorary for prospective women scientists, the organization could continue its *purpose* although it might have to open its membership to men under Title IX. Many women's groups which are devoted to women's rights (such as NOW and WEAL) nevertheless have male members. In practice the number of men who join such organizations are few in number; those men who do join are usually very sympathetic to the purpose of the organization.

If honorary societies are exempted from coverage by Title IX (as proposed by the Casey Amendment), males will also be deprived. For example, male nursing students will continue to be deprived of the opportunity to join the honorary nursing society.

Honorary societies are not social groups; their criteria for admission should not be based on sex (as would be allowed by the Casey Amendment or by exemption from Title IX).

Note that the statute in no way prohibits any private organization from doing anything it wants, *off-campus*. The organization is prohibited from discriminating *only* when there is "significant assistance" provided by the recipient of federal funds (86.31(b)). This interpretation is in line with cases under the 14th and 5th Amendments of the Constitution (see footnote 8).

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[18] Ibid.

SUMMARY

The Title IX regulation does not control institutions. It does not tell them what to do or how to do it. It simply says that whatever an institution does, it must not discriminate on the basis of sex. The federal government does not, for example, require an institution *to abolish* parietal rules or *to enact* parietal rules. That decision is rightly the prerogative of an educational institution. What Title IX does mandate is that if parietal rules exist, they must apply to both sexes equally. If an institution has no parietal rules, then that, too, applies to both sexes equally.

In general, the challenges to the regulation are often based on misconceptions of what the regulation actually says and what the law mandates, as well as a lack of knowledge of the legislative history and relevant court cases. Some persons who oppose the regulation actually are opposed to the Act itself and are unable to distinguish between the two.

Women's groups and educational institutions have waited three long years for this regulation. Educational institutions need guidance from the federal government in order to comply with the Congressional mandate for equal educational opportunity. Sending it back to HEW for further drafting will only delay the implementation of Title IX and will deny to women and girls the educational opportunities that are the birthright of their brothers.

WHAT CONSTITUTES AN "EDUCATION PROGRAM OR ACTIVITY" UNDER TITLE IX?

ARE PROGRAMS THAT DO NOT DIRECTLY RECEIVE FEDERAL FUNDS, SUCH AS ATHLETICS, COVERED?*

Title IX of the Education Amendments of 1972[1] mandates that:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving Federal financial assistance.*"[2] (Italic added.)

The statute itself does not define "program or activity." Indeed, from a straightforward examination of the statute, it is not clear whether "program or activity" encompasses:

(1) *only* those programs or activities directly receiving federal monies;

(2) *all* programs or activities (whether or not they directly receive any federal money) if *any* program or activity within the institution receives federal money; or

(3) something between these two extremes—that is, all programs or activities directly receiving federal money, as well as some programs or activities not directly receiving federal money.

HEW's interpretation of the coverage of Title IX (as outlined in the proposed regulations issued in June 1974) falls between the first two extremes, although it leans towards the broader interpretation.[3] This paper discusses some of the issues which could appropriately be considered in determining the proper coverage of Title IX.

If "program or activity" is interpreted narrowly to include *only* those programs or activities directly funded by the federal government, an institution would be legally free to discriminate in all programs or activities which did not directly receive federal aid. Such an interpretation would severely limit the impact of Title IX, and would be contrary to the purpose of the statute as outlined in Title IX's legislative history. For example, under a narrow interpretation a department of economics (which did not directly receive federal funds) would be able to limit the admission of women, while the biology department in the same institution (which directly received federal monies) could not discriminate on the basis of sex.

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*This paper draws heavily on a report, "Sex Discrimination in Athletics and Physical Education," by the American Civil Liberties Union Women's Rights Project (January 1975).

[1] Education Amendments of 1972 § 901–907, 20 U.S.C. §§ 1681–86 (1972).

[2] Education Amendments of 1972 § 901(a), 20 U.S.C. § 1681 (1972). Certain schools are exempt from all or part of the statute. For a discussion of these exemptions, as well as a summary analysis of Title IX, see Margaret C. Dunkle and Bernice Sandler, "Sex Discrimination Against Students: Implications of Title IX of the Education Amendments of 1972." 18 *Inequality in Education* 12 (1974).

[3] Subpart B, Section 86.11 of the proposed regulations provides that, with certain exceptions dictated by the statute, the nondiscriminatory requirements of Title IX apply "to every recipient and to each education program or activity operated by such recipient which receives *or benefits from* Federal financial assistance." (Italic added).

On the other hand, the broadest interpretation of Title IX (that is, covering *all* programs or activities if *any* programs or activities receive federal money) would allow HEW to terminate all federal financial assistance to an institution if there were any sex discrimination in any activity. Thus, an institution which discriminates in one program could *automatically* be subject to the loss of all of its federal grants, contracts and loans. Such an interpretation would in effect treat the whole institution as one "program." HEW is not proposing

There are no cases as yet under Title IX to aid in defining "program or activity." However, the *identical* language in Title VI of the Civil Rights Act of 1964[4] has been interpreted in Board of *Public Instruction of Taylor County* v. *Finch*.[5] The court held that Title VI does not intend wholesale cutoffs of federal aid: rather, it requires a case-by-case determination of those activities which might be discriminatory.

Some people who disagree with HEW's interpretation of the coverage of Title IX (and Title VI) cite *Taylor* v. *Finch* as justification for limiting coverage only to those activities that receive direct federal assistance. However, *Taylor* v. *Finch* dealt with the question of whether discrimination in *one* federally assisted program could automatically result in termination of *all* federal funds, even when there was no finding of discrimination in other programs. The court clearly ruled that illegal discrimination in one part of the school system does not *automatically* "infect the whole," and that "each program receives its own 'day in court.'" At the same time, however, the court clearly supported the concept that discrimination in one part of the school system *could* indeed "infect the whole":

"The administrative agency seeking to cut off funds must make findings of fact indicating *either* that a particular program is itself administered in a discriminatory manner, or *is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory*." (Italic added.)

Thus, *Taylor* v. *Finch* specifically allows for the possibility that sanctions could be used to prevent discrimination in activities that do not directly receive federal aid: federally assisted programs can be "infected by a discriminatory environment." By requiring "separate consideration of the use or intended use of federal funds" and disallowing wholesale cutoffs of federal funds to *all* programs, the court made clear that its aim was to protect the "innocent beneficiaries of programs *not* tainted by discriminatory practices." There is no language in the decision that in any way condones discriminatory practices in non-federally assisted activities that affect students in programs aided by the federal government.

Also, many institutions receive federal financial aid in non-programmatic ways (such as loans or other student assistance programs). Such general funds, as well as direct programmatic assistance, often enable institutions to support numerous other school activities, such as athletics and other extra-curricular activities.

A narrow interpretation limiting application of Title IX (and Title VI) to programs directly funded by the government would undoubtedly lead to funneling general funds (such as student assistance) to specific non-discriminatory programs while allowing blatant discriminatory practices to exist elsewhere in the institution—practices that the law was enacted to prohibit. Under such an interpretation, a school could conceivably maintain an extensive athletic program for males (but not for females), or deny or limit the admission of women to departments or divisions which receive no federal funds (such as a school of music or art), or give preference to males when math or science classes are overcrowded, or limit access to a dining room on the basis of sex. Such an interpretation should not only be contrary to the letter and spirit of the law: it would also run counter to principles established in numerous constitutional cases involving race discrimination, in which courts have held that the education functions of a school district or college include any service, facility, activity or program it sponsors, including athletics and other extra-curricular activities.[6]

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[4] Civil Rights Act of 1964. 42 U.S.C. § 2000d(1). Title VI prohibits discrimination on the basis of race, color or national origin in all federally assisted programs. Title IX was patterned after Title VI; the legal sanctions for noncompliance are identical under both statutes.

[5] 414 F. 2d 1068 (5th Cir. 1969).

[6] American Civil Liberties Union Women's Rights Project, "Sex Discrimination in Athletics and Physical Education," January 1975, p. 9 of attachment 8.

Since sex discrimination in these areas, when occurring in publicly supported institutions, may well be prohibited under the constitution, it would be both awkward and unusual for Title IX to allow what may be constitutionally prohibited.[7]

Is There a Private Right To Sue Title IX

Do individuals who believe that they have been subjected to sex discrimination in an educational institution have a *private* right to bring suit against that institution under Title IX of the Education Amendments of 1972?

Yes, according to a September 17, 1974 letter from HEW Assistant General Counsel Theodore A. Miles to Bernice Sandler. Miles states:

"The private right to bring suit against an educational institution has been held to exist under the analogous provisions of Title VI of the Civil Rights Act of 1964, *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847 (5th Cir. 1967), and we believe that in holding in that case would be followed under Title IX."

The language of Title IX is patterned after Title VI of the Civil Rights Act of 1964 (which forbids discrimination on the basis of race, color or national origin in all federally assisted programs). Because of the similarity in language, precedents under Title VI are likely to be applied to Title IX.

In *Bossier*, the court found in favor of *private* plaintiffs who had brought suit under Title VI against a school district for alleged discrimination on the basis of race. According to Miles:

"The Court held that Section 601 of Title VI stated a reasonable condition that the United States may attach to any grant or financial assistance and may enforce by refusal or withdrawal of Federal assistance." 370 F. 2d at 852. Therefore, once the school district accepted Federal financial assistance, it brought its school system within the class of programs subject to the Section 601 prohibition against discrimination and '[*N*]*egro school children, as beneficiaries of the Act, have standing to assert their Section 601 rights.*' 370 F. 2d at 852." (Italic added.)

Similarly in *Lau* v. *Nichols*, 94 S.Ct. 786 (1974), the Supreme Court accepted a Title VI case and found in favor of the *students*. Although the question of the *right* of a private individual to sue was not at issue, the Supreme Court's acceptance of the case strongly implies this right. (These students of Chinese ancestry had alleged unequal educational opportunities because they did not receive English language instruction.)

The complaints did not exhaust their administrative remedies in either *Bossier* or *Lau*. That is, they did not first file complaints with HEW and wait for the results of an HEW investigation. In neither case did the court consider either whether exhaustion of remedies was necessary or whether HEW was an indispensable party in the complaint. However, the decision in Bossier and the court's acceptance of the case in *Law* suggest that exhaustion is not necessary and HEW is not indispensable.

In his letter, Miles further points out that the requirements and assurances outlined in § 86.4 of the proposed Title IX regulations are "directly analogous to the assurance required of a recipient by Title VI, and would carry with it the same obligations concerning the prohibited discrimination and concerning the rights of beneficiaries under Title VI." In short, "[*p*]*rivate plaintiffs under Title IX would have the right of suit as beneficiaries of the Act, and would have standing to assert their Section 901 rights*" *under Title IX*. (Emphasis added.)

What Constitutes Equality for Women in Sport?*

FEDERAL LAW PUTS WOMEN IN THE RUNNING

Colleges across the country are reviewing their sports and athletic programs to determine if they provide equal opportunity to their female students. Federal law now mandates that institutions eliminate policies or practices which discriminate against students, as well as employees, on the basis of sex.[1] In addition, enthusiasm for women's athletics is increasing rapidly.

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[7] Private institutions also come under these constitutional prohibitions when there is "substantial" state involvement.

*This paper could not have been written without the research contributions of Caroline Cole, a student at Connecticut College and coxswain on the Connecticut College crew team.

There is a growing recognition that women's athletics, especially women's intercollegiate athletics, is likely to change dramatically in the next decade. A report to the American Council on Education on intercollegiate athletics found that:

"The most important and far-reaching recent development on the college sports scene has been the movement to achieve equal treatment for women in the conduct of intercollegiate athletics."[2]

Some institutions have been reluctant to change policies and practices mandated by athletic conference or association rules, even though they have a discriminatory impact. Such regulations, however, *do not* alter the obligation of an institution to provide equal opportunity to women and men under federal law. It is becoming increasingly likely that, because of pressure on institutions to have nondiscriminatory policies, athletic association and conferences will be forced to change their rules and regulations.

Legally it does not matter whether or not an institution provides any given service or opportunity. What does matter is that the services and opportunities it does provide not discriminate on the basis of sex.

Although the prospect of coeducational teams has attracted the most attention, there are a variety of issues which must be considered in evaluating opportunities for women in sport. Some issues and remedies are relatively clear cut; others are not.

This paper outlines some of the issues related to equal opportunity for women in sport, giving examples of some situations that might have to be reassessed, and discussed some of the alternatives that are being proposed.

THE EDUCATIONAL VALUE OF SPORT

Most people believe, to some extent at least, that there is a complementary relationship between a healthy mind and a healthy body. Throughout the ages many philosophers have maintained that vigorous physical activity builds character and develops citizenship, as well as contributing to physical well-being. But, according to *Sports Illustrated*, this reasoning has not been applied equally for women and men:

"Sports may be good for people, but they are considered a lot gooder [sic] for male people than for female people.[3]

The Victorian image of women as physically weak led most early educators to downplay physical activity for women. It was the women's colleges—Vassar, Wellesley, Goucher—which first encouraged women to engage in vigorous exercise, apparently on the theory that women could do their best mental work only if it were balanced by physical activity. Also, the founders of these colleges felt that it was necessary to disprove claims that women did not have the physical ability or stamina needed for a college education.[4]

Sport and athletic programs for women have traditionally focused on instruction and lifetime sports. In general, competitive athletic programs have grown out of physical education programs. Much of the tradition for men in sport and athletic programs, however, has been tied to competitive athletic programs. Although these two traditions are not necessarily contradictory, they have oftentimes led to the development of programs for women and men which are strikingly different. This paper attempts to address issues of concern to people interested in sport, no matter what their specific orientation.

ATTITUDES TOWARD WOMEN IN SPORT

Athletics is a sensitive issue for many people. Because athletics reflect cultural norms, they have tended to perpetuate sex stereotypes and myths about what is "right" for men and what is "right" for women. Men are "supposed to be" strong and aggressive, both physically and emotionally, while women are "supposed to be"[4] weak and passive. Women have not been encouraged to participate in athletics at least partly because the traits associated with athletic excellence—achievement, self-confidence, aggressiveness, leadership, strength, swiftness—are often seen as being in "contradiction" with the role of women. As a Connecticut judge stated in a 1971 decision that denied women the right to participate on a cross country team:

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[1] Although (as of April 1974) the implementing regulations for the legislation prohibiting sex discrimination among students (Title IX of the Education Amendments of 1972) had not been issued, the law has been in effect since July 1972.

[2] George H. Hanford, *A Report to the American Council on Education on An Inquiry into the Need for and Feasibility of a National Study of Intercollegiate Athletics* (Mar. 22, 1974), p. 49.

[3] Bill Gilbert and Nancy Williamson, "Sport Is Unfair to Women," *Sports Illustrated*, May 28, 1973, p. 90.

[4] Betty Spears, "The Emergence of Women in Sport," in *Women's Athletics: Coping With Controversy*, ed: Barbara J. Hoepner (District of Columbia: American Association for Health, Physical Education, and Recreation, 1974), pp. 27–28, 38–39.

"The present generation of our younger male population has not become so decadent that boys will experience a thrill in defeating girls in running contests, whether the girls be members of their own team or an adversary team . . . Athletic competition builds character in our boys. We do not need that kind of character in our girls, the women of tomorrow. . . ."[5]

Jack Scott, former Athletic Director at Oberlin College, commented on the attitude toward women in athletic circles:

"As a male athlete knows, there is nothing worse than being called 'feminine' when he makes a mistake in athletics, especially in a contact sport. . . . [M]ale athletes from 12-year old kids to 36-year old professional football players have had tears brought to their eyes by that kind of 'condemnation.'"[6]

In contrast, comparing a female athlete to a man is seen by many as the highest compliment. When the coach of Micki King, one of the finest divers in the world, wanted to compliment her:

"[He] . . . made the remark that she dives like a man . . . . So quite clearly, what Micki King did was dive correctly; and this was labeled the 'masculine way.'"[7]

Attitudes such as these are difficult to overcome. Sometimes women compare the discrimination that they have faced in sport to the discrimination that blacks have faced. Although these two types of discrimination are obviously not identical, there are some similarities. Just as men's teams have refused to compete with women, white teams once refused to compete with blacks.

Myths die slowly. Although some societies have encouraged women in sport more than others, there have always been vigorous women. The great bull-leaping acrobats of the Minoan culture were women. Etruscan and Spartan women and men trained together. Egyptian and Greek legends credit women with the invention of ball games. Henry VIII complained of the expense of keeping Anne Boleyn in archery equipment.[8]

The attitudes that people have about women in sport influence the total athletic opportunities that are available to women—the funding of their programs, the adequacy of their facilities and equipment, the employment conditions of their teachers and coaches, etc.

THE LEGAL MANDATE FOR EQUALITY FOR WOMEN STUDENTS IN SPORT

The legal mandate for equal athletic opportunity regardless of sex comes from Title IX of the Education Amendments of 1972. The key section of Title IX, which became effective on July 1, 1972, reads:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance."[9]

All educational institutions which receive any federal money are covered by the anti-discrimination provisions of Title IX. Virtually every college and university receives some form of federal financial assistance. Although there are some exemptions from non-discriminatory *admissions*, Title IX requires all educational institutions to provide equal opportunities to their students regardless of sex once they are admitted.

The implication of Title IX for the issue of equality in sport (as well as for a variety of other issues) are considerable.[10] Interestingly, although the Education

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[5] *Hollander v. The Connecticut Interscholastic Athletic Conference, Inc.*, No. 12-49-27 (Conn. Sup. Ct. 1971).

[6] Jack Scott, "The Masculine Obsession in Sports," in *Women's Athletics: Coping With Controversy*, ed: Barbara J. Hoepner (District of Columbia: American Association for Health, Physical Education, and Recreation, 1974), p. 84.

[7] Scott, p. 85.

[8] Marjorie Loggia, "On the Playing Fields of History," *Ms.*, July 1973, p. 63.

[9] Pub. L. No. 92–318, Title IX, § 906(a), 86 Stat. 373, June 23, 1972.

[10] Other areas that Title IX can be expected to influence are: nondiscrimination in admissions and the award of fellowships and financial aid, equal job opportunities for female and male students, flexible programming and part-time opportunities, sex-stereotyping in textbooks and the curriculum, the equalization of student rules which are different for women and men, sex-typed counseling, honorary societies which admit one sex only, and women's studies programs, and so forth.

Amendments Act was hailed as landmark education legislation, the sex discrimination prohibitions were generally ignored by the press and little noted by the educational community.

Title IX empowers the government to withdraw funds, debar institutions from eligibility for future funds and to bring suit against institutions which discriminate against students or employees on the basis of sex. The enforcement provisions of Title IX are patterned after those of Title VI of the 1964 Civil Rights Act, which prohibits discrimination against the beneficiaries of federal monies (students) on the basis of race, color or national origin. Title IX (like Title VI) is enforced by the Office of Civil Rights of the Department of Health, Education, and Welfare. Charges of discrimination may be brought by writing to the HEW Secretary, specifying the nature of the discrimination.

Although (as of April 1974) the implementing regulations were not issued, Title IX has been in effect since July 1972. HEW's Office for Civil Rights, which has jurisdictional power over Title IX, had not fully decided (as of April 1974) exactly how Title IX would apply to some aspects of sports and athletic programs. Despite this, a number of complaints of sex discrimination in sport and other areas have already been filed. For example, women students have filed complaints of sex discrimination against the University of Michigan and the University of Wisconsin concerning the athletic and sports programs.

Prior to the enactment of Title IX, charges of discrimination in sports programs could only be brought under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. Perhaps the most common challenge under the Fourteenth Amendment has been by women who were prohibited from participating on "male" teams by the rules or regulations of an athletic conference or association.[11] In most instances, there were no parallel female teams. In all probability many future complaints of sex discrimination in sport will be brought under both Title IX and the Fourteenth Amendment.

The existence of state laws, or rules and regulations of an athletic association, which permit or require different treatment based on sex is not a defense to charges brought either under Title IX or the Fourteenth Amendment. In accordance with the concept of federal supremacy, the obligation to comply with federal law supercedes the obligation to comply with state law or regulations of private associations (such as athletic associations or conferences).

Federal law does not presume to dictate what specific philosophy or practices an institution must follow concerning sport. This is an educational decision which belongs to those who formulate educational policy at an institution. *Federal law does require, however, that once a philosophy or practice is determined, it be applied equally regardless of sex and that it not have a disproportionate impact on one sex.*

It would be equally legal, for example, for a college to have no competitive athletic program whatsoever or to have an extensive competitive athletic program, so long as the policies were applied equally regardless of sex.

Many aspects of sport at the college level—especially male competitive athletics—are coming under increasing scrutiny and criticism. For example, the American Council on Education has recently sponsored a preliminary study of the educational, economic, legal, moral, political, and sociological aspects of intercollegiate athletics in an effort to identify problem areas and formulate recommendations to alleviate these problems. Challenges and questions to the philosophy and operations of college athletic programs are coming from a variety of sources and can be expected to lead to significant changes. Certainly some of these changes will be caused by an effort to eliminate discrimination against women in sport.

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[11] For example, girls in Nebraska, Minnesota and Indiana have recently established their right to join the all-male golf, tennis, cross-country track and cross-country skiing teams when there were no parallel teams for women. [*Brenden v. Independent School District 742*, 342 F. Supp. 1224 (D. Minn. 1972); *Reed v. Nebraska School Activities Association*, 341 F. Supp. 258 (D. Neb. 1972); *Haas v. South Bend Community School Corporation, et al.*, No. 10718309 (Indiana Supreme Court, 1972)]. Rulings in Illinois and Connecticut, however, have gone the other way [*Bucha v. Illinois High School Association*, 351 F. Supp. 69 (N.D. Ill. 1972) and *Hollander v. The Connecticut Interscholastic Athletic Conference, Inc.*, No. 12-49-27 (Conn. Sup. Ct. 1971). *Hollander* was settled by agreement with U.S. District Judge, and the Interscholastic Athletic Association will amend its regulations to permit females to compete in noncontact sports when no team program exists for females.] The state of Pennsylvania is suing the Pennsylvania Interscholastic Athletic Association under both the Fourteenth Amendment and the state constitution for failing to offer female athletes the same opportunities and experiences as male athletes. (*Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Association.*)

WHAT CONSTITUTES EQUALITY FOR WOMEN IN NON-COMPETITIVE PROGRAMS?

Non-competitive and instructional programs in general include programs in which participation is not based on skill. This would, for example, include all physical education and instructional classes, recreatonal opportunities and most intramural and club sports.[12]

Discrimination in non-competitive (as well as competitive) programs is widespread. To some extent at least, this is a potential problem area on virtually every coeducational campus in the country. To illustrate the pervasiveness of the problem, each of the following sections begins with actual examples of how discrimination might maniflest itself on campus. Although the examples are real-life, the institutions at which they occurred are not named.[13]

INSTRUCTIONAL OPPORTUNITIES AND MIXED PHYSICAL EDUCATION CLASSES

> At a prestigious private institution the women's and men's physical education departments were separate and the instructional courses available to female and male students varied considerably. For example, women could not take wrestling and men could not take self defense or volleyball.
>
> At a southern state university female students could not take coaching courses for credit, with the result that they were not "qualified" to coach teams.

Many physical educators and women's groups argue that there is no justification for single-sex non-competitive or instructional programs. Under Title IX, the lack of duplicate facilities (such as locker rooms and bathrooms) could not be used as a reason for excluding one sex or the other. Bathroom and locker room space may have to be reallocated, but in any event Title IX would *not* require women and men to undress in front of one another or to share the same bathroom at the same time.

Because of different interest patterns between women and men, it is likely that some instructional classes will continue to be made up primarily of members of one sex. However, women's groups are urging institutions to take care to assure that classes which are primarily male not receive preference over classes which are primarily female in such areas as facilities and equipment, scheduling of classes, or teacher competence.

Many college physical education majors are preparing to become elementary or secondary school physical education instructors and/or coaches. In some institutions the credentials that women can acquire in college for this job are more limited than those a male can acquire. For example, women may be prohibited from taking coaching courses either at all or for academic credit. Or a semester of a "male" sport (such as flag football) may be required as a prerequisite for a coaching course. The result is that, upon graduation, she is not "qualified" to coach teams and is effectively barred from a common career ladder—that from physical education instructor, to coach, to head of the athletic department, to mid-level administrator, to principal. Policies which prohibit one sex from taking courses which develop their skills would have the lingering effect of limiting future job opportunities and would be a violation of Title IX.

Some women's groups are stressing that institutions be on guard not to offer courses which might have the effect of discriminating against women. For example, if an institution offered coaching instruction only for predominantly male sports, it might leave itself vulnerable to criticism and charges from women's groups.

SEX-BASED REQUIREMENTS FOR PHYSICAL EDUCATION MAJORS

> At an Ohio libral arts college women majoring in physical education must take a service course each term. There is no similar requirement for men.

Some institutions have different requirements for majors in physical education for their female and male students. A different number of courses may be required of female and male students, a different grade point average may be required for graduation or graduation with honors, the selection of courses required or offered may be different, etc. Whatever the difference, it seems clear that such sex based differentiations violate Title IX.

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[12] In some instances, intramural or club sports may be defined as competitive rather than non-competitive.

[13] This format—that is, beginning each section with actual examples of how discrimination might manifest itself on campus—is followed throughout this paper.

REQUIREMENTS FOR GRADUATION

At a Pennsylvania college women must show proficiency in two sports in order to graduate. Men need only to show proficiency in one sport.

Different requirements for graduation for female and male students may take a variety of forms.

Men, but not women, may be able to exempt required physical education courses by taking a skills test.

Male, but not female, varsity athletes may be exempted from physical education classes.

Men, but not women, may receive academic credit for participating in intercollegiate athletics.

Women, but not men, may be able to fulfill their physical education requirement by taking such courses as square dancing, bowling or archery.

Whatever the form of the difference, it is clear that such sex-based differences are a violation of Title IX.

Institutions which allow students to exempt their physical education requirements by excelling on a fitness test may well be faced with a dilemma. For reasons of physiology and training it is likely that male students will in general score higher on these tests than female students. A test which failed a disproportionately large number of women might be found discriminatory under Title IX.

INTRAMURAL PROGRAMS

At a major state university, women were prohibited from participating in any of the five team sports in the "All Campus Division Program." They could only compete in the individual or dual sports.

It is common for intramural programs to provide more opportunities for men than women, regardless of the interest of women in participating. Many women's groups stress that strong intramural programs for women can serve an "affirmative action" function—that is, they can provide women with the opportunity to develop athletic skills that they did not develop earlier because of lack of facilities, training or encouragement.

RECREATIONAL OPPORTUNITIES

At one Ohio institution a woman could not use the handball courts a male signed up for her.

At a large midwestern university, the intramural pool was specifically reserved for "Faculty, Administrative Staff and Male Students" for approximately two hours each day. That is, this was a time for men only.

Providing different or greater recreational or leisure sport activities for members of one sex might prompt charges of sex discrimination. Students might challenge this under Title IX, while employees might challenge the practice as a discriminatory fringe benefit under employment legislation.

WHAT CONSTITUTES EQUALITY FOR WOMEN IN COMPETITIVE ATHLETICS?

The disparities between opportunities for women and men in competitive athletics are often even more pronounced than the disparities in non-competitive athletics. Although these differences exist for a variety of reasons, it appears that they will be closely examined in determining if an institution is complying with the requirements of Title IX.

In general "competitive athletics" refers to athletic teams for which selection is based on competitive skill. This might include programs at the varsity, junior varsity, freshman, or (in some instances) the intramural and club level. As used in this paper, the term competitive athletics includes the activities that are commonly referred to as intercollegiate athletics.

PHYSIOLOGICAL DIFFERENCES BETWEEN THE SEXES

It has sometimes been argued that vigorous physical activity renders women sterile or otherwise damages them. This belief, as well as a number of more subtle myths, has certainly been disproven. These myths include the following:

Participation in athletics might damage a woman's reproductive organs. In fact, many gynecologists believe that vigorous activity improves the muscular support in the pelvic area. The uterus is one of the most shock

> resistant internal organs and considerably more protected than male genitalia.
>
> Athletic activity causes menstrual problems and impedes menstrual regularity. In fact, the reverse appears to be true.
>
> Women can't reach peak performance during menstruation. In fact, although there is a great deal of variability among women, women Olympic athletes have won competitions and broken records during all stages of their menstrual cycles.
>
> Female bones are more fragile than male bones. In fact, they are on the average smaller, not more fragile.
>
> Women are more likely to be injured in sports. In fact, the injury rate per participant is lower for girls than boys in both contact and non-contact sports.
>
> Females should not play contact sports because they might damage their breasts. In fact, medical and athletic authorities argue that breast protectors could be designed for women, just as various protective equipment has been designed for men's organs.
>
> Women who engage in strenuous athletics develop bulging muscles. In fact, given the same amount of exercise, the development of bulging muscles depends primarily on the amount of male hormone a person has.[14]

Before puberty, males and females are nearly identical in their physical abilities. Tests of strength, muscular endurance, cardiovascular endurance and motor performance show few differences between the sexes up to this age. Beyond that age, however, the male becomes considerably stronger, possesses greater muscular and cardiovascular endurance and is more proficient in almost all motor skills. These differences increase in magnitude with time, and the female tends to plateau between the ages of ten and fourteen. According to Dr. Jack Wilmore, however:

"Recent evidence . . . indicates that these differences may be more of an artifact of social or cultural restrictions imposed on the female either at or just prior to the outset of menarche, than a result of true biological differences in performance potential between the sexes." [15]

A major physiological difference between adult women and men is that men *on the average* are larger and heavier than women. The average woman, on the other hand, is more flexible and has better balance. Women in sport point out that most sports emphasize and reward traits in which men tend to excel.

Averages can be misleading.—Although a superbly fit adult female may be at a real disadvantage competing with a superbly fit adult male in athletic contests which depend primarily on speed and strength, she might well outperform an *average* male. In the words of Dr. Thomas E. Shaffer:

". . . while there are very significant sex-related differences between males and females, it should be borne in mind that there are undoubtedly greater differences between the third and the 97th percentile in each sex than there are differences between the average female and the average male in terms of physical performance." [16]

In other words, *all* men are not superior to *all* women in all athletic skills. There is a good deal of overlap in ability between the sexes, so that a sizable number of women outperform a number of men.

FACILITIES AND EQUIPMENT

> At an Ivy League college the women's crew team was given inferior equipment because the coach of the men's team did not believe that women could handle the newer, better shells. At another eastern college, the crew coach authorized the use of funds designated for *both* the female and male teams to purchase a shell designed for men only, rather than for a shell both sexes could readily use.
>
> When the new gym was built, the old gym was "retired" to the women.

Generally there are great differences between the facilities and equipment available for women's and men's competitive athletics, even for the same sports.

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[14] Kathleen M. Engle, "The Greening of Girl's Sports," *Nation's Schools*, September 1973, p. 29; and interview with Dr. H. Royer Collins, *Nation's Schools*, September 1973, p. 30.

[15] Jack W. Wilmore, "Strength, Endurance and Body Composition of the Female Athlete," paper presented at the American Medical Association's 15th National Conference on the Medical Aspects of Sports, Anaheim, Calif., Dec. 1, 1973.

[16] Thomas E. Shaffer, "Physiological Considerations of the Female Participant," in *Women and Sport: A National Research Conference*, ed: Dorothy Harris (State College, Pennsylvania, 1972), p. 330.

For example:

The women's teams may get the "left over" equipment from the men's teams or they may get the old equipment when the men's teams get new equipment.

Uniforms may be provided for the male team only, or the uniforms for the male team may be more elaborate.

The women may have inferior gym or locker room facilities.

The equipment for the male team may be of a higher quality or they may have more "backup" or practice equipment.

Equipment (such as practice uniforms, tennis rackets) may be provided for male, but not female, teams.

All of these practices are likely to be challenged under Title IX. Many institutions are beginning to evaluate the equipment and facilities to assure that there is no disparity based on sex.

PROVISION OF MEDICAL AND TRAINING FACILITIES AND SERVICES

The university health service provides team doctors for varsity athletics for men, but not women.

At a private eastern university, members of the male football team ate at a "training table" which featured high protein food. No similar provisions were made for any female athlete.

At a west coast state university, certain insurance programs are available to men athletes only.

A woman athlete who injured her knee could not use the ultrasonic machine available for therapy of male athletes.

An institution which provided such differential services (including insurance coverage) to male, but not female, athletes would leave itself vulnerable to charges of sex discrimination under Title IX.

SCHEDULING OF GAMES AND PRACTICE TIMES

The women's varsity basketball team at an ex-women's college had difficulty practicing because they were allowed to use the gym only when the men's teams did not want to use it.

The women's swimming team at one elite eastern school had to practice on week nights after dinner because no other time was made available for the women to practice.

Routinely giving priority to teams of one sex in scheduling of games or practices might well be considered a violation of Title IX. For example, all of the following may be called into question under the law:

Assigning male teams to the most desirable seasons of the year and times of day to compete and/or practice.

Allowing male teams longer practice sessions, at the expense of practice sessions for female teams.

Giving varsity teams priority use of facilities if there are substantially more men than women that compete at the varsity level.

To resolve these problems, female and male teams could, for example, alternate days (with the women using the facilities on Monday and Wednesday, the men on Tuesday and Thursday and both on Friday and Saturday). Likewise, they could alternate "desirable" and "undesirable" times (so that, for example, neither team always played on a weeknight or a weekend).

AVAILABILITY OF FUNDS FOR TRAVEL AND PER DIEM ALLOWANCES

In order to pay for travel to athletic events, the members of the women's teams had to sell candy bars and hold bake sales, while the men's teams traveled by chartered bus at the university's expense.

The women's teams had to pay for their own transportation and meals, while the university footed the bill for first class air fare for the men's football team.

Often, in part because of strikingly different funding mechanisms and levels for women's and men's sports, there are wide discrepancies in the opportunities that female and male teams have for travel. Often the per diem allowances for men are considerably higher than those for women. Indeed, in some institutions, the women have no per diem allowance.

Using different standards and providing different opportunities and amounts of travel and money for female and male teams is coming under increasing challenge. Some people are proposing that all (or predominately) male teams and all (or predominately) female teams travel together, and compete at the same institutions on the same days so that travel costs are simultaneously shared and minimized.

ATHLETIC SCHOLARSHIPS

> If a woman accepted an athletic scholarship, she was automatically banned from many competitive intercollegiate athletics.

Until the spring of 1973, the Association for Intercollegiate Athletics for Women (AIAW) had a strict policy forbidding female competitiors in intercollegiate athletics from accepting *any* financial aid that was based in whole or part on athletic ability. This policy grew out of a concern that the provision of scholarships or other financial assistance specifically designated for athletes created a strong potential for abuses which could be detrimental to both the student and the quality of the institution's athletic program for women. Women saw the problems with athletic scholarships for men and tried to avoid the same problems in women's intercollegiate athletics by banning scholarships entirely. The different positions of the women's and men's athletic associations on the issue of scholarships are illustrative of the different approaches and traditions in women's and men's athletics. The AIAW policy was changed largely in response to a suit (*Kellmeyer, et al.* v. *NEA et al.*) brought by female tennis players at Marymount College (Florida) who protested being denied the right to participate in the prestigious AIAW-sponsored intercollegiate competition because they were recipients of athletic scholarships. Now the AIAW no longer prohibits female athletes from accepting athletic scholarships.[17] In large part because this prohibition has been lifted, a number of institutions now offer women athletic scholarships.[18]

Athletic scholarships may come from a variety of sources; the impact of Title IX *may* vary according to the source of income. For example, it seems clear that scholarships which come from general university funds, student activity fees, etc. must be awarded in a nondiscriminatory manner. That is, they could not provide different amounts or types of aid, limit eligibility, apply different criteria or otherwise discriminate on the basis of sex. These scholarships would have to reflect the interest and capabilities of the student-athletes, regardless of sex.[19] Although the Title IX regulations are not yet out (as of April 1974), they might allow an institution to offer single-sex scholarships for "affirmative action" purposes—that is, in an effort to overcome the effects of past discrimination. However, scholarships which are administered by a group outside the institution and which the university in no way endorses, approves, lists or perpetuates can be limited to one sex.

A related issue to that of scholarships is the availability of student employment. Providing different employment opportunities or options for female and male athletes or referring them differentially to jobs on the basis of sex would undoubtedly be deemed a violation of Title IX, as well as of other legislation prohibiting sex discrimination in employment.

RECRUITING ATHLETES

> The regulations of the Association for Intercollegiate Athletics for Women state that some "recruitment practices may be contrary to educational objectives" and clearly forbid subsidizing campus visits of prospective student athletes. The regulations of the National Collegiate Athletic Association, on the other hand, permit the institution to subsidize recruiting athletes in a variety of ways.

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[17] There may, however, be some problems in the differences between the eligibility requirements specified by the governing associations or conferences for female and male athletes. For a brief discussion of this, see "Separate-But-Equal Structures" later in this paper.

[18] For a listing of institutions which offer athletic scholarships to women, see Nancy Parson's article, "Sports Scholarships for Women," in the March–April 1974 issue of *The Sportswoman*.

[19] It seems likely that a university could not, for example, meet the nondiscriminatory requirements of Title IX *simply* by opening up all varsity football, varsity basketball and heavyweight wrestling scholarships to women because such a policy would effectively exclude women.

The practices surrounding recruiting male college athletes have periodically erupted in scandal over the years. There is increasing concern over recruitment practices at present because, according to the *New York Times* (March 10, 1974), they are becoming more like a "frenzied slave market" as more and more athletic departments run in the red. Because of the cost and the pressure, forty-one colleges have dropped football in the past ten years.

The issue of sex discrimination does not rest on whether or not recruiting is desirable. It rests on equality. For example, if an institution feels that recruiting student athletes is not desirable, it may wish either to use the pressure for equity to de-emphasize recruiting for males, or to begin recruiting female athletes with the same intensity that they have been recruiting males.

MEDIA COVERAGE OF SPORTS

> In some stadiums, women are not allowed in the press box, with the result that they cannot adequately cover games.
>
> Women at a prestigious western university protested so-called "honey shots" of women spectators at sports events. The women said that they neither wanted nor needed "the defense of their physical attractiveness by [the] sports information director or the media."

Women at a number of institutions have raised the issue that women's athletics have not received sufficient coverage in university publications (press releases, bulletins, newspapers, etc.) or that the public information office of the institution provides services for men's, but not women's athletics. It seems clear that such university-sponsored or funded publications or services are bound by the university's obligation not to discriminate on the basis of sex.

THE SELECTION OF SPORTS AND LEVELS OF COMPETITION

> A large midwestern university spent over $2,600,000 on its men's intercollegiate athletic program. There was *no comparable program* for women's intercollegiate athletics. In fact, *no university money whatsoever* was officially spent on women's intercollegiate athletics.
>
> At a formerly all-female college, men compete in five sports (with an annual budget of $4,750), while women have three sports (with a $2,060 budget).

A competitive athletic program often includes sports at the varsity, junior varsity, freshman and occasionally the intramural or club level. The level of competition offered is expected to vary according to the skill level of the participants and opportunities for competition. However, because fewer women generally participate in competitive sports, their opportunity for competition at various levels is limited. As part of an "affirmative action" or "remedial action" program concerning women's athletics, an institution might both encourage its own women students to participate in athletics and encourage other institutions to develop competitive sports programs for women, so that the women at a given institution would have greater options for competition.

Some people are recommending that institutions conduct periodic student surveys to determine the sports in which members of each sex would desire to compete, the appropriate levels of competition, and whether teams should be single sex or mixed. They argue that these assessments would provide institutions with guidance concerning the most appropriate way to expand opportunities as women become more involved in competitive athletics. They further argue that these surveys should be conducted yearly (perhaps using data processing cards at registration) so that the athletic opportunities for women students are responsive to changing interest patterns. Opponents of this plan, however, say that such a survey would be difficult and expensive to administer and that it poses a governance problem. They also fear that they would be forced to change the athletic opportunities available for *men* if male students were similarly allowed to play a major role in determining what athletic opportunities were available to them.

THE CALL FOR AFFIRMATIVE ACTION FOR WOMEN'S ATHLETICS

Women's groups are saying that institutions should take affirmative action to overcome the effects of past discrimination in competitive athletics. Already there have been a number of changes in the athletic opportunities available to women in educational institutions. Several states have passed state laws to open up athletic opportunities to women. Others have expanded the opportunities available to women in response to pressure and complaints from civil rights groups and women's groups. In addition, a growing number of institutions are conducting studies to determine the adequacy of the athletic opportunities for competitive athletics. They stress that institutions should use their facilities and services to the fullest to assure substantial participation by women in competitive athletics.

COMPETITIVE ATHLETICS: SINGLE SEX VS. MIXED TEAMS

This issue is as complex as it is controversial. A number of organizations have taken stands on it, often for very different reasons. The question of "coed teams" has generated more publicity and more court action than perhaps any other issue concerning women in sport.

Often people ask if the fact that a sport is a "contact sport" can be used to justify prohibiting women and men from playing on the same team. Those who oppose coeducational contact sports generally base their opposition on a concern for the physical safety of the women or on the idea that women and men should not be forced into "contact" situations.[20] Advocates of coeducational contact sports point out that competitive athletics are, by their very nature, closely supervised, and medical experts and physical educators say that the woman who is capable of making a competitive team is no more susceptible to injury than a man who is capable of making a team. Also, there appears to be no legal basis under Title IX for differentiating between contact and non-contact sports.

Perhaps it would be helpful to outline some of the factors that one might consider in evaluating which structure—mixed (coeducational) teams, single sex teams or some combination of the two—is most likely to provide equal opportunity in competitive athletics for both women and men.

In evaluating these structures, institutions may find it helpful to keep in mind that the impact of a policy or practice must fall equally on both sexes. In other words, does the policy have a disproportionate effect on one sex or the other?

SHOULD ALL TEAMS BE COMPLETELY COEDUCATIONAL?

To some, complete integration of the sexes in all sports would appear to be both the most simple and the least discriminatory solution. Upon closer inspection, however, it becomes clear that, because of the differences in training and physiology, such an arrangement would effectively eliminate opportunities for women to play in organized competitive athletics. For these reasons, this alternative would not appear to be in line with the principle of equal opportunity.

SHOULD THERE BE TWO TEAMS FOR EACH SPORT: ONE FEMALE, ONE MALE?

One way in which an institution might attempt to be in compliance with Title IX would be to operate parallel male and female single sex teams (without discrimination in services, facilities, equipment, etc.) for *each* sport. However, a major problem with this approach is that "separate-but-equal" has been generally considered *inherently unequal* since the Supreme Court outlawed racially segregated education in 1954. In general, the only times that "separate-but-equal" has been considered acceptable when sex discrimination was involved has been in issues related to privacy (such as the use of bathrooms, locker rooms, dressing rooms, etc.). Opponents of the "separate-but-equal" approach have also criticized it because it does not allow the superior female athlete to compete on the male team (which might well be the team with the highest ability level). Moreover, this alternative might be prohibitively expensive.

Advocates of this alternative maintain that applying the "separate-but-equal" principal in competitive athletics can be justified for sex discrimination (but not race discrimination) because there are general physical differences between and men (but not between blacks and whites). They maintain that women's athletics are different from men's athletics, even when the game they are playing is the same. (As an example of this, they cite the different strategies and skills that are involved with women's and men's tennis.) Superior women athletes could not "move up" to the men's team, so that the women's team would not be undercut by losing its best athletes.

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[20] Some people maintain that having women and men compete in contact sports would infringe on their privacy rights. Counsel for the New York City Board of Higher Education concluded, however, they did not believe that participation in contact sports would violate a person's right of privacy.

A major advantage of the separate-but-equal team approach is that, because the two teams can operate in unison in many areas, this approach might be a fast and effective way to rectify some of the current imbalances in resource allocation and spectator interest. For example, a method of scoring modeled after that used in the Olympics has been suggested by a number of people as a way to capitalize on the "two team" concept. Under this, female teams would compete against female teams and male teams against male teams (alternating the game order, since the second game is generally the "star attraction"). The scores of the two contests would be totaled to determine the winning school. For example, if a school's women's basketball team won 80 to 60 and the men's team lost by 55 to 70, then the school would have won the competition by a five point margin (135 to 130). Proponents of this approach point out that having the two teams travel and compete together would minimize travel expenses and provide an incentive for those involved with women's and men's athletics to work together more closely.

SHOULD THERE BE TWO PREDOMINANTLY SINGLE SEX TEAMS, WITH A PROVISION ALLOWING THE "UNDERDOG SEX" TO "COMPETE UP"?

This idea has been suggested as a way to provide the superior female athlete with a chance to "compete up" (that is, compete for a position on the men's team). This mechanism would work in the following manner: Assume that there are "separate-but-equal" teams for women and men. However, the skill level of one team (for example, the men's team) is considerably higher than the skill level of the other women's) team. Therefore, in this case, women could "compete up" but men could not "compete down." The result of this alternative would be two teams—one team which would be substantially male (but officially open to either sex) and one team open to women only.[21] (Of course, neither team could be favored in terms of facilities, opportunities, etc.) This situation would be analagous in some ways to the opportunity that members of the junior varsity team often have to try out for the varsity, while the reverse is not permitted.

Although this approach might provide the superior female athlete with the opportunity for the highest level competition, it has been criticized as administratively unwieldy and too complex to be workable. In addition, some women fear that this practice would have the effect of skimming off the best players from the women's teams. Opponents of this approach also point out that, although the woman who makes the men's team is likely to be one of the best players on the women's team, she is not likely to be one of the best players on the men's team.

SHOULD THERE BE THREE TEAMS: ONE FEMALE, ONE MALE AND ONE MIXED?[22]

Proponents of this "three team" approach maintain that it offers the best features of both the single sex and mixed approaches. They argue that it would provide opportunities for students who want to compete on single sex teams, as well as mixed teams. In addition, they maintain that this alternative would provide the most students with the opportunity to participate in competitive athletics. They argue that, if competitive athletics is an important part of the educational experience at an institution, as many students as possible should have the opportunity to participate in them.

On the other hand, those who oppose this approach point out that having three teams for a sport could be prohibitively expensive. They also maintain that having three teams would dilute the available athletic talent and result in mediocre athletic contests. In addition, they say that it would be difficult to find other institutions with similarly structured teams to compete against, since this approach would require a rather large participation rate. Also, women's groups fear that, unless there is a requirement that the mixed team be fifty percent female, it would become in effect a second all male team.

IF THERE IS A SINGLE TEAM FOR A GIVEN SPORT, SHOULD IT BE SINGLE SEX OR MIXED?

The concept of "separate-but-equal" teams is complicated by the fact that women and men often have different interest patterns. Generally institutions offer different competitive athletics for women and men based on the assumption that they have different interests. For example, an institution might offer field hockey for women and football for men. Assuming equal opportunity, this situation poses no problem until a woman tries out for the football team or a man tries out for the field hockey team. The institution is at this point faced with deciding whether it is in the interest of equal opportunity to allow the member of the opposite sex to try out for the "single sex" team.

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[21] In some instances (for example, the balance beam and some other gymnastic events), this situation might well be reversed.

[22] The arguments for and against allowing women to "compete up" that were outlined earlier would apply here as well.

Many people argue that not allowing the person to try out for the team would infringe on his or her individual rights. Others counter that the effect of this "open door" policy could well be discriminatory: that is, while a good many men might qualify for the "women's" field hockey team, few (if any) women would qualify for the "men's" football team. They argue that the *effect* of this two-way open door policy would be to provide substantially more competitive athletic opportunities for more men than women and that, if men were allowed on the "women's" field hockey team, the "women's" team might eventually be predominantly male.

In trying to resolve this difficult situation and assess whether integrating the single sex team would be discriminatory or in line with equal opportunity, an institution might examine the overall pattern of competitive athletic opportunities offered to women and men. An institution might, for example, decide to provide one fall sport for each sex—field hockey for women and football for men. (This assumes that roughly equal facilities, opportunities, etc., are provided for both teams.) Based on this decision, the university might refuse women the opportunity to participate on the football team *and* refuse men the opportunity to participate on the field hockey team (especially if opening up both teams would have the effect of displacing a significant number of women but few, if any, men).

The above reasoning assumes that there are roughly comparable female and male teams and programs for similar sports (e.g., field hockey/football) in a given season. If these "equal" opportunities do not exist, the argument for keeping a team single sex does not apply. In fact, some people argue that, if there is not sufficient interest to have separate teams for the same sport, then the institutions must open up the one team it does have to both sexes on a competitive basis.

SHOULD TEAMS BE BASED ON HEIGHT AND WEIGHT?

Although this structure does not officially depend on sex, the height/weight categories (certainly the categories at the extremes) would be virtually single sex. For competitive athletics, this structure has been criticized because:

It might give the illusion of nondiscrimination, while at the same time perpetuating discrimination, especially if priority were given to the larger height/weight teams (which would generally be all male).

It would require too many separate teams to be administratively feasible and it would therefore be prohibitively expensive.

Some persons claim that there are valid physical differences (such as muscle mass) between the sexes, even between women and men of the same height and weight.

Although this arrangement is probably not practical or desirable for all competitive athletics, a number of people maintain that it would be a viable option for intramural non-competitive and instructional programs.

WHAT OTHER ALTERNATIVES ARE THERE?

In the July 1973 issue of *Ms.* magazine, Brenda Feigen Fasteau, a lawyer for the American Civil Liberties Union Women's Rights Project, identifies several other options, all of which she finds *unacceptable:*[illegible]

A system involving ability-determined first and second-string teams. She finds this inequitable because it would probably result in *two* all or predominantly male teams, with no increased opportunities for women.

A first-string team that is sex-integrated and a second-string all-female team. This might be criticized for discriminating against men.

A first-string team based on ability with a second-string team that was evenly divided between women and men. Fasteau does not favor this approach because it would have the result of favoring boys by virtually assuring them one and a half out of the two teams.

[illegible] Fasteau favors separate teams, even if the outstanding female athlete does not have the opportunity to compete at the highest level.

> A quota system requiring half females and half males. This system, she feels, would cause a variety of problems, among them "intrateam ostracizing of the [women] who dilute the overall performance and interteam exploitation of the 'weaker sex' by members of the opposing team."

There is considerable disagreement among physical educators, legal experts and women's groups about what is the best approach to this difficult and complex problem. Other alternatives not mentioned here may evolve as the issue is studied more closely and as various approaches are put into practice. Women's groups are stressing that it is especially important to look at the *results and effects* of policies, as well as the policies themselves, to determine if there is equal athletic opportunity for women.

COMPETITIVE ATHLETICS: THE FUNDING OF PROGRAMS

The issue of funding is central to the issue of equality. Although there may not be a one-to-one relationship between the amount of money expended and equal opportunity, it seems certain that funding levels and mechanisms will need to be studied in evaluating the degree of inequity for women in sport.

Some women's groups are pressing for an "equal expenditure" standard. Using this principle, institutions would be required to spend the same amount of money per student or per participating athlete for females and males. They argue that this is the best way to make certain that women and men have equal opportunities. In contrast to this point of view, some athletic associations argue that revenue producing sports should be partially or totally exempt from the requirements of Title IX.

Perhaps the crux of the problem concerning funding women's intercollegiate athletics is that, with a finite amount of money available for intercollegiate athletics, providing more equal funding for women's teams may mean that institutions cannot afford to continue to fund men's teams at high levels.

The issues involved with the funding of programs—where the money comes from, how much is allocated and what it is used for—are both complex and closely interrelated. The following outlines some of the important areas:

THE SOURCES OF FUNDS

> At a western state university the men's athletic program is funded as a line item in the regular budget. The women's program, however, must compete with the chess club to receive student activities fees.
>
> At one large state institution, only $5,000 of the $68,000 raised by student fees for athletics was allocated for women's programs, even though about 50 percent of the student body was female.

The sources of funds for athletics vary greatly from campus to campus; often the sources of funds for women's and men's athletics *on the same campus* are dramatically different. Although this situation makes providing equal opportunity a more complex issue, it is doubtful that having different *sources* of funding for women's and men's competitive athletics is in itself a violation of Title IX, provided that such funding does not have a disproportionate effect on the basis of sex in terms of programs, facilities, etc.[23] If the athletic programs for women and men are funded in different ways, the burden to prove that this complex funding pattern does not discriminate on the basis of sex is likely to lie with the institution.

The funds for intercollegiate athletics may come from such diverse sources as a line item in the institution's budget, student activities fees, revenue generated by athletic events, the athletic department (which is generally all male), the women's or men's physical education department, or from fund raising activities. (In addition, of course, funds for the support of intercollegiate athletics may also be "hidden" in the institution's budget in a number of ways—maintenance on the stadium, practice gyms and fields; health care provided by the university health service; salaries of coaches or trainers; giving athletes special consideration for scholarships or student employment; and so forth.) A study of the "Status of Funding of Women's Intercollegiate Athletics" (*Journal of Health, Physical Education and Recreation*, October 1973) found that the most frequently mentioned "best" funding source was a line allocation from the school budget. However, only

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[23] Some women's groups argue that, even if separate sources of funding (or separate structures) are allowed for competitive athletics to the extent that they are single sex, there is no justification for such differences in *non-competitive* or instructional athletic programs.

25 percent of the programs received funding from this source. A far larger proportion (41 percent) depended on student activity fees. Those that were funded from these fees in general expressed a high degree of dissatisfaction because of a lack of consistency and security in funding from year to year.

In addition to its inconsistency (especially if allocation is governed by the student government), using student activity fees differentially for women's and men's athletics may pose a problem with students. Since this money is designated for student activities, its allocation can expect to come under fire from women on campus when it does not fund women's athletics at a reasonable level, compared to the men's program. At one state institution, for example, women students protested the allocation to men's athletics of 86 percent of the $115,000 earmarked for athletics. At other institutions, women are protesting having their student activities fee "automatically" buy them entrance to men's intercollegiate athletic events. (This money is then treated as "revenue" from these sports.)

THE SOURCES OF FUNDS: REVENUE PRODUCING SPORTS

Athletic organizations and some university representatives argue that revenue producing sports (such as football and basketball) should be exempted from the requirements of Title IX either entirely or to the extent that any revenue produced is used to perpetuate that sport.[23] They argue that, even though these teams are all-male, they are in a class by themselves. They fear that certain sports revenues would decrease if the fund raisers couldn't promise that funds would be spent on the teams they had traditionally supported. They feel that this would cause a particular problem in colleges where revenues from one sport support other competitive sports as well. Women's groups contend that such exemptions would perpetuate the *status quo*. They point out that the effect of allowing revenue to be retained for the expenses of a particular team would have a substantial discriminatory effect. For example, members of a men's basketball team might have their uniforms and travel expenses covered, while members of the women's basketball team might have to pay for their own uniforms and travel out of their own pockets (as indeed many women athletes now do). In addition, some women's groups maintain that, if revenue producing sports are exempted in some way from the requirements of Title IX because they resemble business activities more than educational programs, these sports do not belong on a college campus in the first place.

It is not yet clear what position HEW's Office for Civil Rights will take on this issue. It might be helpful to examine what *might* happen in two different fact situations—i.e., when a sport runs in the red and in the black: [24]

> *When a Competitive Sport Makes a Profit.*—Assume that the income from a sport was $500,000 and that the total cost of maintaining that sport was $450,000. This leaves a profit of $50,000. (1) If revenue producing sports were exempted totally, this $50,000 could be used in in any manner whatsoever. (However, if this $50,000 profit were funneled back to the college for general expenses or for other sports programs, it would probably be subject to the same nondiscrimination requirements as other general institutional funds.)
>
> (2) If revenue sports were exempt only to the extent that they are self-financing, the institution would be required to use only the profit ($50,000) in a nondiscriminatory manner. (For example, excess revenues from male intercollegiate athletics could not be used to support only other male sports—a practice that women's groups charge is common.) (3) If revenue producing competitive athletics were not exempted at all, the entire $500,000 would have to be used in a nondiscriminatory manner.
>
> *When a Competitive Sport Runs in the Red.*—Assume that the income from a sport was $100,000 and that the total cost of maintaining that sport was $175,000. This results in a $75,000 deficit. Also assume that the institution followed the common practice of underwriting this deficit. (1) Even if revenue producing sports were totally exempt, the institution would probably be under considerable pressure to include the $75,000 subsidy of the sport in their assessment of female and male athletic opportunities. (2) If revenue producing sports were exempt only to the extent that they are self-financed, the institution would undoubtedly be required to include this $75,000 subsidy

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[23] These revenues might come from gate receipts, concessions at the stadium, television contracts, or money from booster's clubs.

[24] We stress that these interpretations are, at this point, speculative. They are included only to give some idea of the possible interpretations of the law.

in evaluating equal opportunity. (3) If revenue producing competitive athletics were not exempt at all, women's groups argue that the entire $175,000 would have to be accounted for in a nondiscriminatory manner.

The above examples are considerably more simple than actual funding situations. In most institutions the cost of maintaining revenue producing competitive athletics is interwoven into a variety of budget categories—the maintenance department, the physical education and/or athletic departments, capital expenditures (for stadiums, etc.), equipment, etc. Separating out the extent (in dollars and cents) to which a given sport is supported by an institution is no simple task.

In addition, it would be necessary to define what expenses would be included in the "self-financed" definition. For example, would funds for athletic scholarships be treated like salaries and included in this definition of "self-financing?"

One final point to keep in mind is that, no matter what position the government takes on the issue of revenue producing sports, an institution could not differentially allow teams of one sex or the other to engage in revenue producing sports.[27]

THE SIZE OF THE BUDGET

> At a large state university in the northwest, women's sports received only *nine-tenths of one percent* of the institutions two million dollar athletic budget ($18,000), even though *over forty percent* of the undergraduate students were women.
>
> At a major state university, *over 1300 times* as much was spent for men's intercollegiate athletics than for women's.

Although they may have once had some validity, the reasons most often given for funding women's athletics at a low level often do not hold up under scrutiny. It has been shown that, given encouragement and ample opportunity, female students become interested in athletic programs. They practice seriously and strenuously. Given ample support and publicity, women's sports can create as much spectator interest as men's sports. For example, girls' basketball in Iowa is a major sport, and outdraws boys' basketball.

Disparities between the budgets for women and men are a central concern when evaluating an institution's athletic program. These disparities may take the form of differences in either the *total amoutn of money* spont on women's and men's sports or the *amount of money allocated per sport* for women and men. A recent study reported in the *Journal of Health, Physical Education and Recreation* (October 1973) found that the average annual budget for all of women's athletics at institutions was $8,905 (or about *a dollar per student*). However, the average "optimal" budget for women's athletics was $21,600, well over twice the actual budget. In comparison with the budgets of many men's athletic departments, even this "higher" figure seems modest indeed.

It is likely that women's sports will require considerable budget increases to provide fair opportunities to women students, especially when new programs are being "geared up." However, it is unlikely that women's competitive sports will require, in the near future, the identical funds that men's competitive sports now require. According to the *New York Times* (March 15, 1974), nine out of every ten college athletic departments (which are generally all or predominently male) run at a deficit—a deficit which is usually covered by university operating funds. The National Collegiate Athletic Association (NCAA) estimates that the current *annual* deficit of its members is almost fifty *million* dollars.

The issue of equal opportunity for women can provide an opportunity to assess the total athletic program (for both women and men) in light of the goals and objectives of the institution.

THE USE OF THE FUNDS

> At a private New England College the budget for the male (but not the female) teams included funds for travel. The women had to hold bake sales, sell Christmas trees and seek donations in order to fund their travel.

Women in competitive athletics commonly report that their budgets do not cover (or do not cover adequately) a variety of items that are covered in the men's budgets. Commonly cited as examples of this are inequities in allocations for travel, equipment and uniforms, as well as for scholarships and recruitment.

Problems in this area are related to the fact that often competitive athletic programs for women and men are administered separately, receive very different per student or per sport allocations, and receive their money from different sources. Some women's groups are concerned that institutions will attempt to justify differences in the use of funds for female and male athletics because they are run by separate departments or receive their funds from different sources. The implication of having separate administrative mechanisms or budgets for women's and men's athletics is that it would be essential for the parallel departments to coordinate their budgets very closely. (It is also not clear whether or not Title IX will allow two separate administrative structures to exist.)

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[27] Until recently, the women's athletic association prohibited charging admission at women's athletic events.

"SEPARATE-BUT-EQUAL" ADMINISTRATIVE STRUCTURES IN ATHLETIC AND PHYSICAL EDUCATION DEPARTMENTS, AND GOVERNING ASSOCIATIONS

> At a large midwestern football power the men's sports programs are controlled by the athletic department while the women's programs are under the auspices of the physical education department.
>
> At a western state university the women's athletic department is an administrative subsection of the men's department.
>
> Men's intercollegiate athletics are governed by the National Collegiate Athletic Association while women's intercollegiate athletics are governed by the rules of the Association for Intercollegiate Athletics for Women (which is a division of the Division for Girls and Women's Sports of the American Association for Health, Physical Education and Recreation). The rules of these two organizations vary considerably.

Federal policy does not mandate specific administrative structures for athletics; it is rightfully the perogative of an institution to establish its own mechanisms for implementing its philosophy concerning sport. What the government does require, however, is that the philosophy concerning sport be applied equally for women and men and that the implementing mechanisms not have a discriminatory impact on one sex or the other.

The main structural problem in sports and athletics revolves around the "separate-but-equal" question. It is not uncommon for an institution to have distinct departments or divisions for women's and men's competitive and non-competitive athletics—or to have a department for men's athletics only (with women's athletics handled by the women's physical education department). Also in general women's and men's competitive athletics are governed by different associations with different rules, regulations and policies.

The pros and cons of "separate-but-equal" administrative governing structures are complex. There are sincere debates concerning whether the principle of equal opportunity would best be served by having one single integrated structure for both sexes, or by separate structures for each sex. Proponents for separate structures argue that merging them would mean that women would lose whatever control they now have over women's sports. They argue that merger would mean "submerger" (i.e., that men would more completely dominate the nature of sport for women, while women would still have no control over men's sports). Advocates of integrating the two structures argue that combining the two structures would give women's athletics a welcome boost and would force institutions to promote women, as well as men, to positions of responsibility. Still others argue that, while there is no justification for separate structures regarding non-competitive programs, single sex structures and governing associations should be permitted for *competitive* athletics to the extent that single sex competitive athletics are permitted. Many of the arguments concerning "separate-but-equal" single sex teams can be applied to this situation as well.

In many instances women have had little influence at the policy making level even in their own programs because they are sparsely represented (if they are represented at all) on boards of directors, athletic councils and other decision making bodies. Some women in physical education say that the meager role they play in making decisions concerning women in sport has a discriminatory impact that outweighs that of unequal salaries and discriminatory promotion policies.

Some institutions have been reticent to challenge policies or practices mandated by athletic conferences or association, even though they have a discriminatory impact on women. Although athletic conferences and associations are not *directly* prohibited from discrimination under Title IX, institutions cannot rely on conference regulations as an excuse or rationale for discriminatory practices in their athletic and sports programs. Institutions *must* provide non-discriminatory programs regardless of conference rules and regulations. For example, the differential association or conference requirements for each sex concerning eligibility for financial aid or for participation in intercollegiate sports do not absolve the institution from the obligation to treat the sexes equally.

Many educators and women are fearful that institutions might automatically follow the practices of the male associations and conferences when they adopt uniform standards and policies to cover both sexes. They urge institutions to use this opportunity for reevaluation to ensure that new uniform policies are indeed nondiscriminatory and are in line with the educational philosophy of the college.

WHAT CONSTITUTES EQUALITY FOR WOMEN EMPLOYEES IN SPORT?

The legal basis for providing equal employment opportunities for women in sport is well established.[28] Federal laws and policy forbid educational institutions from discriminating against employees on the basis of sex in hiring, urgrading, salaries, fringe benefits, training or all other conditions of employment.[29] Institutions which violate these statutes and regulations face losing federal monies, having federal funds delayed, being debarred from receiving federal monies in the future, and possible court action.

Discrimination against women physical educators and coaches has, perhaps more obviously than any other employment discrimination, a dual impact. In addition to discrimination against the woman employee, the woman student suffers as well because many physical activities have traditionally been segregated by sex in the past. For example, sex discrimination in employment in sport often means that women students are denied the benefits of adequate coaching instruction, and other athletic opportunities.

The following examples of employment discrimination are not intended to be exhaustive. Instead, they are intended to illustrate some of the unique ways in which employment discrimination against women in sport occurs.

HIRING

> A woman who had worked for several years in the women's physical education department applied for an opening on the men's athletic staff. Though qualified for the job, she was not even considered. Instead, a recent male graduate was hired.

In the past many physical education and athletic programs have followed a policy of hiring only women to teach or coach women and only men to teach or coach men. It is becoming increasingly clear that there is no legal justification for this policy.[30] Of course, the right of privacy of both employees and students would be protected (i.e., women and men would not be required to use the same bathroom or locker room facilities at the same time). The lack of these facilities could not be used as a justification for excluding one sex or the other.

LENGTH OF APPOINTMENTS

> The men in the athletic department are given 12 month appointments, while the women can only negotiate 9 month contracts.

While an institution might have legitimate nondiscriminatory reasons for negotiating contracts of different lengths with different employees, offering different conditions or options on the basis of sex would undoubtedly be judged illegal.

SALARIES AND COMPENSATION

> A woman was paid half of what a male was paid to officiate *in the same game.*

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[28] For a copy of a chart (prepared by the Project on the Status and Education of Women) that outlines *Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions,* write to the Public Information Office, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C. 20201.

[29] Executive Order 11246 prohibits employment discrimination on the basis of sex, race, color, religion or national origin by federal contractors. Title VII of the 1964 Civil Rights Act prohibits all employers, even those which do not have federal monies, from employment discrimination on the basis of sex, race, color, religion or national origin. The Equal Pay Act of 1963 prohibits all employers from sex discrimination in salaries. Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex by any educational institution that receives federal funds.

[30] Title VII of the 1964 Civil Rights Act permits an employer to limit a job to one sex only if sex can be proven to be a "bona fide occupational qualification" (bfoq). The courts have interpreted this exemption very narrowly: for example, acceptable bfoq's are "lingerie fitter" and "rest room attendant" (provided the attendant is in the rest room while it is in use).

> At a major midwestern university the men's athletic director is paid $10,000 more than the women's athletic director, even though they perform essentially the same work.
>
> Coaches at a state university in the south are paid to coach the men's teams. The coaches for the women's teams are not paid to coach; they are paid as physical education instructors only, and coach (without compensation) *in addition to* their full-time teaching responsibilities.
>
> The women's basketball coach at a small New Jersey state college is paid considerably less than her male counterpart.
>
> The male coaches, but not the female coaches, receive extra duty pay and/or "release time" to coach.

All of these examples are variations on the same theme: women are paid less to coach or teach women than men are to coach or teach men.

The law mandates equal pay for equal work (which is generally defined in terms of the skill, effort and responsibility involved). Judging equal pay is a relatively simple matter when evaluating two people officiating at the same game and performing the same tasks.[31] Similarly, it is not difficult to compare a female and male tennis coach (who perform the same functions for the female and male teams, respectively). It is somewhat more difficult to compare an individual male *football* coach to an individual woman *tennis* coach, however. It is not clear whether the government enforcement agencies will make such comparisons. However, if male coaches as a group are consistently paid at a higher rate than women coaches as a group, the question of a pattern of discrimination arises.

OPPORTUNITIES FOR ADVANCEMENT, PROMOTION AND TENURE

> Preference for the position of athletic director was given to candidates who had risen through the ranks of the football coaching staff—a career ladder from which women were excluded.
>
> The women's athletic director is an associate professor, while her male counterpart is a full professor.

Many women charge that they are shut out of opportunity for advancement in the athletic hierarchy before they even get started. For example, it is a common practice to require candidates for the position of athletic director to have experience coaching football (or to give preference to those candidates who have this experience). Women, however, have been excluded from football coaching jobs. Such a promotional or hiring pattern might be judged illegal, unless the institution could prove that women had not been excluded from these positions in the past. This practice might also be challenged on the basis of whether or not experience in coaching football is essential to performing the duties of an athletic director. In no event, however, could qualified women be denied on the basis of sex the opportunity to be members of the football staff in the future.

In addition, many women have a lower rank than their similarly qualified male counterparts who do essentially the same work. One would expect this sort of inequity to be resolved as a part of the campus affirmative action plan.

AVAILABILITY OF SUPPORT SERVICES AND BENEFITS

> While the women's athletic director is aided by one student assistant for 15 hours a week and has about 200 square feet of work space, the male athletic director has an assistant, a civil service bookkeeper, a business manager, five secretaries and a suite of offices.

Lack of sufficient support services can perpetuate discrimination against women in sport. For example, athletic programs and student interest in these programs do not develop partly of inadequate support services. At the same time, the small size of the program and lack of student interest are used to justify the continued inadequate support services. It is clear that the mandate for equal athletic opportunity calls for breaking this cycle by providing sufficient services so that the sport program for women might develop.

Also, the principle of nondiscrimination applies to opportunities for research, opportunities to attend conferences and professional meetings, etc.

There is no simple answer to the question, "What constitutes equality for women in sport?" The issues are complex and many of the problems are not easily resolved. There is a strong mandate from federal law, administrators, physical educators, women athletes and women's groups, however, for constructive change. Equity demands that women be given a "sporting chance."

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[31] None of the anti-discrimination legislation prohibits differences in pay based on a bona fide seniority or merit system, provided the system is not discriminatory on the basis of sex or any other prohibited ground.

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IN ADDITION

There is now a Center for Women and Sport. (The Sports Research Institute, College for Health, Physical Education and Recreation, White Building, University Park, Pennsylvania 16802). Directed by Dr. Dorothy V. Harris, the Center was formed to expand research interests in all areas relating to the female involved in physical activity.

The Women's Equity Action League (WEAL) has developed a "sports kit" focusing on the Title IX regulations and other issues. For a kit, send $2.00 to WEAL, 799 National Press Building, Washington, D.C. 20004.

For information concerning recent legal developments concerning women in sport, contact the Women's Rights Project of the American Civil Liberties Union (22 East 40th Street, New York, New York 10016) or refer to back issues of the *Women's Rights Law Reporter* (180 University Avenue, Newark, New Jersey 07102).

NOTE.—The Project on the Status and Education of Women of the Association of American Colleges began operations in September of 1971. The Project provides a clearinghouse of information concerning women in education and works with institutions, government agencies, and other associations and programs affecting women in higher education. The Project is funded by the Carnegie Corporation of New York, the Danforth Foundation, and the Exxon Education Foundation. Publication of these materials does not necessarily constitute endorsement by AAC or any of the foundations which fund the Project.

APRIL 1974.

[From the Congressional Record, Nov. 19, 1974]

SEX DISCRIMINATION AGAINST STUDENTS: IMPLICATIONS OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972[1]

SEX DISCRIMINATION AGAINST STUDENTS

Mr. BAYH. Mr. President, with the publication of the proposed guidelines of title IX by the Department of Health, Education, and Welfare, there have been a number of inquiries raised as to the intent, purpose, and actual effect of title IX on education institutions.

As the author of title IX, I am anxious to respond to those inquiries. Therefore, I ask unanimous consent that an excellent article by Dr. Bernice Sandler, director for the Project on the Status of Women, and Margaret Dunkle, associate for the Project on the Status of Women at the Association of American Colleges, entitled "Sex Discrimination Against Students: Implications of title IX of the Education Amendments of 1972" be printed in the Record.

There being no objection, the material was ordered to be printed in the Record, as follows:

SEX DISCRIMINATION AGAINST STUDENTS: IMPLICATIONS OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.[1]

(By Margaret C. Dunkle and Bernice Sandler)

(NOTE.—Margaret C. Dunkle is Project Associate with the Project on the Status and Education of Women, the Association of American Colleges. Bernice Sandler is Director of the Same Project. The views expressed in this article do not necessarily reflect the views of the Association of American Colleges or the Carnegie Corporation of New York, the Danforth Foundation or the Exxon Education Foundation, which fund the Project.)

Title IX of the Education Amendments of 1972[2] mandates that sex discrimination be eliminated in federally assisted education programs. There has been considerable speculation about what changes will be required of educational institutions to comply with Title IX. Although a few issues (most notably competitive athletics) have generated wide interest, Title IX has significant implications for a variety of less publicized issues including recruiting, admission, financial aid, student rules and regulations, housing rules, health care and insurance benefits, student employment, textbooks and curriculum, single-sex courses and women's studies programs.

Differential treatment of men and women exists in almost every segment and aspect of our society. Perhaps it is the most damaging, however, when it appears in and is transmitted by the educational institutions which are supposed to provide all citizens with the tools to live in a democracy. As the U.S. Supreme Court said in the 1954 *Brown* decision:

"In these days it is doubtful that any child may reasonably be expected to succeed in life if . . . denied the opportunity of an education. Such an opportunity, where the State has undertaken to provide it, is a right which must be made available to all on equal terms."[3]

Footnotes at end of article.

In the past twenty years it has become painfully clear that equal educational opportunity will become a reality only if it is supported by strong and vigorously enforced federal legislation. The long and difficult history of the attempt to eliminate *discrimination on the basis of race promises to be repeated in the attempt to* eliminate discrimination on the basis of sex.

In many instances, the courts have been less willing to prohibit sex discrimination than race discrimination in educational institutions.[4] They have generally not interpreted the due process and equal protection guarantees of the Fifth and Fourteenth Amendments with the same strictness for sex discrimination as they have for race discrimination. Ratification of the Equal Rights Amendment would have the effect of eliminating these dual standards. Lacking constitutional remedies, statutory prohibitions against sex discrimination become especially important.

This article examines the overall implications of Title IX as well as the specific issues which affect virtually every school and college in the country. It attempts to provide some insights into the scope and nature of practices which discriminate against students on the basis of sex, and the changes in these practices which might well be required for an institution to be in compliance with federal law. While discrimination against females was the major reason for the passage of the legislation, the law covers discrimination against *either* women or men on the basis of sex.

Until the fall of 1971, there was no federal legislation prohibiting sex discrimination among students at any level of education. Female students could be (and were) legally excluded from schools and colleges, admitted on a restrictive quota basis, denied admission to certain classes and subjected to a variety of other discriminatory practices. Females had no legal recourse when educational institutions denied them the opportunity that was regarded as the "birthright" of their brothers.

AMENDMENTS TO THE PUBLIC HEALTH SERVICE ACT PROHIBITING SEX DISCRIMINATION

The first federal law prohibiting sex discrimination among students became effective on November 18, 1971. Titles VII and VIII of the Public Health Service Act (PHSA) were amended to prohibit sex discrimination in admissions to federally funded health training programs.[5] There are no exemptions from coverage.

Although the legislation itself speaks only of admission to programs, it appears that the final regulations will also cover treatment of students already enrolled in programs and treatment of employees working directly with applicants to or students in such programs.[6] This broad interpretation is supported by the legislative history of the amendments which indicates that Congress intended to prohibit discrimination among individuals already enrolled in programs as well as applicants.[7] It also appears that an institution's general admissions policies and practices are covered in cases where the federally funded health training programs can be selected as a major after students are admitted. Otherwise, there would not be nondiscriminatory pool of applicants from which to select students.

The Office for Civil Rights (OCR) of the Department of Health, Education and Welfare (HEW) is charged with enforcing the nondiscriminatory provisions of the PHSA. Noncompliance with the requirements of this legislation may lead to the delay of awards of PHSA Titles VII and VIII funds, revocation of current awards of debarment of an institution from eligibility for future awards. In general, the sex discrimination provisions of the PHSA are consistent with and foreshadow the coverage and provisions of Title IX.

TITLE IX OF THE EDUCATIONAL AMENDMENTS OF 1972[8]

Title IX of the Education Amendments of 1972 prohibits discrimination in federally assisted education programs[9] against students and employees on the basis of sex.[10] The key provision of Title IX reads:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . ."[11]

In addition to the prohibition against sex discrimination in educational institutions, Title IX also amends a number of other laws. Section 906 amends various portions of the Civil Rights Act of 1964[12] and the Fair Labor Standards Act of 1938 to include executive, professional and administrative employees under the Equal Pay Act.[13] Section 904 forbids covered educational institutions from

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Footnotes at end of article.

denying an individual admission because of blindness or severely impaired vision.[14]

The sex discrimination provision of Title IX are patterned after Title VI of the Civil Rights Act of 1964[15] which prohibits discrimination against the beneficiaries of federal money on the basis of race, color and national origin, but not sex.[16]

Both the Title VI and Title IX are enforced by the Office for Civil Rights of the Department of Health, Education and Welfare. The legal sanctions for noncompliance are identical: if an institution does not comply with the law, the government may delay awards of money, revoke current awards or debar institutions from eligibility for future awards. In addition, the Department of Justice may also bring suit at HEW's request.

Any educational institution which receives federal monies by way of a grant, loan or contract (other than a contract of insurance or guaranty) is required to comply with the requirements of Title IX.[17] This includes all schools: kindergartens, preschools, elementary and secondary schools, vocational schools, junior and community colleges, four-year colleges, universities and graduate and professional schools.[18] Private, as well as public, institutions are subject to the requirements of Title IX if they accept federal financial assistance.

There are two overall exemptions to Title IX coverage which Congress specifically stated in the legislation:[19]

"An institution controlled by a religious organization is exempt to the extent that the application of the antidiscrimination provisions is not consistent with the religious tenets of the organization. Thus discrimination in such institutions on basis of sex for reasons of custom, convenience or administrative rule is prohibited. This exemption was originally included in the legislation to exempt divinity schools. The burden of requesting and justifying this exception lies with the education institution."

A military school is exempt if its primary *purpose* is to train individuals for the military services of the United States or the merchant marines.[20] This exemption apparently applies to military schools at any level and the U.S. military academies. It does not apply when military training is tangential to the primary purpose of the institution. An example of a tangential relationship would be offering Reserve Officers Training Corps (ROTC) courses.

In addition to these general exemptions, there is an exemption for *admissions* to certain types of institutions, most notably private undergraduate colleges and public single-sex undergraduate institutions. These exemptions are described *infra* at text accompanying notes 35–41. Any other exemptions made as a result of administrative decisions by the Department of Health, Education, and Welfare are likely to come under strong criticism from both women's groups and members of Congress. In addition, the parallel wording of Title IX and Title VI would indicate that there is little, if any, legal justification for administratively exempting something from coverage under Title IX (sex), while clearly covering it under Title VI (race, color, national origin). Civil rights advocates are likely to view attempts to dilute Title IX coverage as an effort to dilute Title VI coverage.

Individuals and organizations can challenge any practice or policy which they believe discriminates on the basis of sex by writing a letter of complaint to the Secretary of Health, Education, and Welfare. They can file on their own behalf or on behalf of someone else (or some other group). Complaints can be filed on a class action basis, with or without specific aggrieved individuals being named.[21] If the government finds discrimination in violation of title IX, the statute require that it first attempt to resolve the problem through informal conciliation and persuasion with the institution.[22] If this process fails to remedy the discrimination, HEW may either hold formal hearings or refer the case to the Department of Justice for judicial action. If discrimination is found following HEW hearings, federal financial assistance can be terminated.[23]

Title IX permits institutions to take affirmative action even in the absence of proven discrimination if, for one reason or another, there is limited participaton by women or men in a federally assisted education program.[24] There is a distinction between *affirmative action* and *nondiscrimination*. Nondiscrimination means simply altering practices which have been discriminatory (*e.g.*, ceasing to recruit only at male schools). Affirmative action means taking steps to *remedy* a situation based on sex which was caused by past discrimination either by the school or by society at large (*e.g.*, sponsoring programs specifically designed to attract female applicants).

Footnotes at end of article.

It is not clear to what extent affirmative action can involve specific preferential treatment on the basis of race or sex. When past discrimination by an insttiution has been *proven*, it is clear that the courts or enforcing agency can require an institution to give preference to remedy the discrimination. The government cannot, however, base such a finding *solely* on statistical evidence of an imbalance without a formal determination that the imblance represents discrimination.[25] However, the question of how to encourage voluntary action for the benefit of one group consistent with the purpose of the antidiscrimination legislation, but without proof of wrongdoing—while at the same time, *not* discriminating against members of other groups—has not finally been resolved.[26]

MANIFESTATIONS OF SEX DISCRIMINATION

Many criteria, policies, practices and procedures which have traditionally been accepted by educational institutions perpetuate sex discrimination in both overt and subtle ways. In general, discrimination falls into two categories:

Overt discrimination, which specifically excludes one sex or specifies different treatment or benefits based on sex. Examples would be admissions quotas for women, different standards of conduct for females and males and single-sex classes. In addition, evaluating the same characteristics or conditions differently for women and men would fall into this category. Such decisions are often unconsciously made because of stereotyped or inaccurate assumptions about the roles of women and men. Although these assumptions may be true for some women and men, they are not true for *all* women and men. Making decisions based or such class stereotypes can perpetuate discrimination.[27] For example, evaluating marital or parental status differently for each sex in determining eligibility for financial aid (because married men are "breadwinners" and would fall into this category. A second subtle way in which overt discrimination might manifest itself is *when sex-neutral policies and procedures are not implemented.* That is, if an institution had a nondiscriminatory *official* policy, but *in practice* followed a discriminatory policy, it would be violating Title IX.

Discrimination as a result of criteria, policies, procedures or practices which appear to be fair, but which have a disproportionate impact on one sex or the other. An example would be prohibitions against admitting older students (since women are less likely than equally qualified men to attend college at a young age) or granting preference to varsity athletes (since there are generally far fewer opportunities for women to compete in varsity athletics). Many policies and procedures which appear to be fair may unintentionally have a discriminatory impact on one sex or the other because one sex has been discouraged from participating in or discriminated against in certain activities. It is conceivable that an institution might argue that using such criteria is not an act of discrimination on *its* part and that it is not responsible for the consequences of past discrimination or exclusion by others.

A principle enunciated in a unanimous Supreme Court decision is relevant to this discussion. In *Griggs* v. *Duke Power Company*,[28] the Court said that any employment policy which has a disproportionate effect on minorities or other protected classes (even though it is fair on its face) and cannot be justified by business necessity, constitutes discrimination barred by Title VII of the 1964 Civil Rights Act. In addition, the Court said that it is the *effect* (rather than the *intent*) of a policy or procedure in operation that determines whether or not there has been discrimination. While the *Griggs* decision occurred in connection with employment discrimination, the same principle has been utilized by the courts in civil rights isues and can be expected to be applied to sex discrimination in education.

RECRUITING STUDENTS[29]

Although the recruitment of students is generally not an issue at the elementary and secondary level, it is of increasing concern to post-secondary institutions because the growing competition for qualified students is becoming more intense. The recruiting process includes information conveyed by written materials (brochures, catalogs, applications) and recruiters or admissions personnel (through campus visits, interviews and correspondence). This process can discriminate against women both overtly and subtly if care is not taken to assure that it is unbiased.

Footnotes at end of article.

The way in which an institution recruits students can have a significant impact on the number of women who apply.[30] Affirmative recruiting to alter a pattern of limited participation by one sex or the other is legal under Title IX. Such affirmative recruiting makes the pool of qualified women applying more accurately reflect the potential pool of applicants and does not necessarily alter the way in which an institution applies its criteria for admission.

Sometimes recruitment policies or practices are overtly discriminatory. More often they are overtly benign, but in one way or another have the effect of discouraging women from applying.

Policies and practices which fairly explicitly exclude women include:

Recruiting only (or predominantly) at male institutions, or recruiting primarily at institutions which discrimnate on the basis of sex in their own admissions procedures, without recruiting at institutions which do not discriminate.

Relying heavily on alumni for recruiting (rather than alumnae). This can have an especially profound effect at formerly all-male schools which have admitted women only recently.

Application forms which ask married female students if they have their husband's permission to attend school, while not asking the same question of married male students. Similarly, asking both sexes for their spouses' permission, but evaluating the response differently for women and men would be discriminatory.

Recruiters who discourage females from pursuing their applications, while not similarly discouraging comparable male applicants.

The more subtle manifestations of discrimination in recruiting have perhaps the most devastating effect on women. Oftentimes institutions and their representatives unconsciously perpetuate discrimination in their publications, application materials and recruiting techniques. All of these items together give a prospective student the "flavor" of an institution and an indication of the status of women on campus.[31] They can either encourage women to apply or have a "chilling effect" on the number of women applicants. Such factors subtly tell a women student if she is as welcome as her equally qualified brother.

In addition to those listed below, the discriminatory policies and practices listed throughout this article can have a "chilling effect" by significantly discouraging women from applying:

Having only or predominantly male recruiters or admissions personnel.

Having pictures in publications which show students as mainly male, while either not showing women at all or showing them primarily in "dating" or social situations.

Describing male sex-typed programs (such as engineering, physics, pre-med programs) in ways which discourage women from applying.

Describing female sex-typed programs (such as home economics, elementary education, nursing) in ways which unnecessarily encourage women and discourage men from aplying. For example, describing students in these programs as she implies that they are fields for women only.

Using the "generic" he in catalogs and other publications.

Listing or having other policies (such as residency requirements or age cutoffs) which might have a disproportionate impact on women.

ADMISSIONS TO PROGRAMS [32]

The issue of sex discrimination in admissions is primarily of importance to postsecondary institutions, although it also has relevance for elementary and secondary vocational or special academic schools.[33] A thorough discussion of the admissions decision is critical for several reasons. If an individual is not admitted to an institution because of sex discrimination, equal treatment in the program becomes irrelevant. In addition, many of the considerations which affect the admissions decisions are mirrored in later treatment of students. An understanding of factors which might influence the admissions decision aids in understanding the nature and operation of sex discrimination against students already admitted to a program.[34]

Exemptions from Admissions Provisions of Title IX [35]

Title IX specifically exempts certain types of institutions from nondiscriminatory admissions. Largely because of pressure from parts of the educational community, Congress exempted the following institutions from nondiscriminatory admissions:[36]

Footnotes at end of article.

Private undergraduate institutions.

Preschools and elementary and secondary schools (other than vocational schools).[37]

Single-sex public undergraduate institutions.[38]

These institutions are exempt from the *admissions provisions* of Title IX only.[39] They are not exempt from the obligation to treat students (and employees) in a nondiscriminatory manner in all areas other than admissions.

Sex discrimination in admissions is specifically prohibited in the following types of institutions:

Public coeducational undergraduate institutions:

Vocational schools, including vocational high schools.

Professional schools.[40]

Graduate schools.[41]

Overt Discrimination in Admissions

In covered institutions, overt quotas that limit the percentage or number of women (or men) violate Title IX. Similarly, an admissions policy based on the number or percentage of applicants from each sex would violate Title IX. For example, admitting 30 percent of female applicants and 30 percent of male applicants would tie admission to sex and could result in admitting members of one sex who were less qualified than some of the students of the other sex who were rejected. Also, ranking or evaluating applicants separately on the basis of sex would be a Title IX violation.

A more unconscious form of overt discrimination occurs when the same characteristics or conditions are evaluated differently for women and men. For example, because of class assumptions about the roles of women and men, a well intentioned admissions officer or counselor may discriminate on the basis of sex by:

Evaluating marital status or potential marital status (whether single, divorced, married or separated) differently for women and men. For example, admitting married men, but not married women.

Making pre-admission inquiries concerning whether a person is "Ms, Miss, Mrs. or Mr."

Evaluating parental status differently for females and males. For example, admitting unwed fathers (while *not* admitting unwed mothers) or admitting men (but not women) with small children.

Evaluating personality characteristics (such as "assertiveness") as a positive factor for one sex (males) and a negative factor for the other sex (females).

Using different standards for admitting women and men because of assumptions about what are suitable and proper fields for women (*e.g.*, home economics, nursing, elementary education) and men (*e.g.*, science, medicine, auto mechanics).

Refusing to admit men, but not women, with long hair.

Admitting older men, but not older women.

Ostensibly Fair Criteria Policies, Practices and Procedures Which Have a Discriminatory Impact on One Sex

Many institutions believe that they have sex-blind (or sex-neutral) admissions criteria and procedures. However, a close examination of these ostensibly "neutral" criteria often reveals that a number are sex biased. For example, an institution might give preference to any "person" who has been a Rhodes scholar. (Since only men are eliigble for Rhodes scholarships, this practice has a discriminatory impact on women.)

It is important to remember that many of the criteria evaluated by admissions officers and committees are not in themselves indicators of performance in a given program or institution. Rather, they are shortcut indicators of success in what is perceived to be a similar situation.

A distinction can be drawn between ultimate (direct) and intermediate (indirect) criteria or qualities:

Ultimate criteria are those which are essential to performing a task satisfactorily. (For example, organizational ability, writing skills, motivation, discipline, creativity, research ability or aptitude in a particular field.) Unfortunately, however, these criteria are often difficult or impossible to measure directly.

Footnotes at end of article.

Intermediate criteria, on the other hand, are the shortcut approximate indicators which are used to roughly gauge the ultimate criteria or ability of a candidate. These are more easily evaluated than ultimate criteria and might include offices held in school, articles published, nature and extent of work experience, grades and test scores or attendance at a particular school.

Intermediate criteria are, of course, indispensable aids to narrowing the field of candidates. However, these criteria are by nature generalizations and as such may be both imprecise and arbitrary when used to measure the ability of a given individual. In addition, because of sex discrimination in society at large, women who have the desired *ultimate* qualities may not have had the opportunity to obtain the most desirable *intermediate credentials.* Therefore, blanket application of ostensibly neutral criteria could result in sex discrimination.

The Supreme Court has recognized, in *Griggs* v. *Duke Power Company,*[62] that certain criteria can post: artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[63]

The Court found that:

> Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and *sex* become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.[64] [emphasis added]

There seems little doubt that this reasoning applies equally to similar discrimination against students in federally assisted education programs.[65]

Assuming that the ultimate criteria evaluated by a selection committee are rationally related to the educational goals of the institution, it is then imperative to examine the intermediate criteria to determine if they are:

Valid indicators of the ultimate qualities desired;

Free of sex bias (that is, not disproportionately excluding one sex or the other).

If an intermediate criterion is in some way sex biased, then the institution would be well advised to look for alternative measures. For example, an institution might consider "competitiveness" a desirable quality for students and use "participation in interscholastic or intercollegiate athletics" as an intermediate measure of competitiveness. Because athletic opportunities are severely limited for women in most institutions, such an intermediate criterion might eliminate women who have the desired ultimate quality (competitiveness). Because discrimination against women often makes it more difficult for them to obtain impressive credentials (intermediate criteria), institutions may find that it is sometimes more difficult to assess the degree to which women (as opposed to men) possess the desired ultimate qualities. As a beginning an institution could broaden its list of acceptable intermediate criteria.

Examples of "intermediate criteria" which might have the effect of disproportionately excluding women include the following:

Membership in a single-sex honorary organization. (In some schools, there is only a men's honorary. In others, where there are two separate single-sex honoraries, the women's honorary is often smaller and/or has higher admissions standards, with the result that fewer women than men have this credential.)

Similarly, using membership in single-sex professional organizations as a criterion can lead to bias. (For example, until 1974 Phi Delta Kappa, the education honorary, did not admit women.[66]

Having received an award available to one sex only. (It is not unusual for there to be fewer "female" than "male" awards and scholarships given. The result of this pattern is that some female students do not receive awards while *less qualified* male students do.)

Having attended an institution which discriminates (or which discriminated in the past) in admission on the basis of sex. (For example, giving preference to individuals from specific private undergraduate institutions—which can maintain sex-based admissions quotas under Title IX—is likely to have the effect of disproportionately excluding women.)[67]

Having received an athletic letter, award or scholarship. (The lack of athletic opportunities for women makes this criterion especially suspect.)

Footnotes at end of article.

Giving preference to students who have held offices in clubs. (For example, in some schools the student body president is "always" male. An equally qualified female student is most likely encouraged to run for secretary or vice president.)

Ability to attend school full-time as a measure of commitment. (Often women with children or women who work find that they are unable to attend school full-time, despite their interest.)

Continuous schooling or employment as a sign of commitment. (Although many women interrupt their education or careers for child rearing, this is generally not an expression of lack of interest or commitment.)

Evaluating late commitment to a profession or vocation as an indicator of lack of seriousness or dedication. (Many women resume schooling or make a new career commitment at a later age than their male counterparts.)

Not admitting "older" students. (Women are more likely than men to discontinue their education so that they might support a student-husband or raise children. In addition, women often have a more difficult time financing their education. At any given level of education, the majority of people who do not proceed to the next level are female. Consequently, the pool of qualified older applicants is likely to be disproportionately female.[48]

Using military service as a measure of a broad background or good citizenship. (In addition to being exempt from the draft, the number of women in the military has been limited by a strict quota, and women admitted to the armed services have to be more highly qualified than men.)

Evaluating part-time or summer employment as a measure of interest and accomplishment. (Because of the general pattern of employment discrimination, women are more likely to have had clerical and other so-called "feminine" jobs, rather than jobs that might be indicative of their interests or potential.)

Evaluating work that is typically "male," such as military service, in a favorable light, while evaluating work that is typically "female," such as child rearing, in an unfavorable light.

Relying heavily on letters of recommendation to gauge such things as commitment, ability to work with others, etc.[49] Such recommendations by counselors, teachers and employers may reinforce stereotyped attitudes of admissions personnel and introduce extraneous factors into the selection process. For example, a number of characterizations that are routinely used to describe female candidates ("charming," "delightful," "feminine," "pretty") are almost never used to describe male candidates and are, in fact, unrelated to academic ability. It is difficult to imagine the following "recommendations" applied to a man:

"Joan is extremely attractive, but she does not let it get in the way of her work."

"Mary has one of the finest minds I've ever seen in a woman."

"Because Sally Jones is somewhat unattractive, she is not likely to marry and waste her professional training."

"Sarah is a delightful person whose good looks will adorn any department."

THE AWARD OF FINANCIAL AID[50]

The award of financial aid is often of prime importance at the post-secondary level.[51] Indeed, an institution's decision to award (or not to award) financial aid to a student is often a major factor in determining which institution a student will attend. Because the award of financial aid also profoundly affects the treatment of students already enrolled in a program, the financial aid practices and policies of an institution are not exempt from the requirements of Title IX, even when the admissions policies are exempt.

The data indicate that women often meet discrimination in the amount and type of financial aid they receive.[52] Discrimination in the award of financial aid can be either overt or subtle (such as using ostensibly fair criteria which perpetuate sex bias).

Some institutions now require women to meet higher (or different) standards than men in order to be eligible for financial aid. Other institutions have favored men over women by:

Offering a woman a loan, while offering a comparably qualified and situated male a fellowship or assistantship.

Offering the most prestigious scholarships, fellowships and assistantships to men while offering women the less prestigious awards.

Footnotes at end of article.

Also, a number of admissions committees have traditionally evaluated the same characteristics differently depending on their sex. In addition to the examples mentioned previously in the discussion of admissions, the following might come under this category:

Denying married women financial aid (while not similarly denying such aid to married men) or offering married women and men financial aid on a different basis. (At some institutions financial aid committees have automatically assumed that a married woman needs *less* assistance because her husband will support her, while a married man needs *more* assistance because he is the "head of the household." While this assumption may be correct in some instances, it is certainly not correct in all instances.)

Offering women and men with dependent children different amounts of aid because of sex-based assumptions about their child care responsibilities. There are also a number of ways in which overtly neutral criteria, policies or procedures discriminate against women in the award of financial aid. All of the "intermediate criteria" mentioned which might have the effect of discriminating against women in admissions (membership in single-sex honorary societies, continuous schooling, etc.) can also have the effect of discriminating against women in the award of financial aid. In addition, policies or procedures which make it difficult (or impossible) for part-time students to receive financial aid or which do not consider the cost of child care in determining need, disproportionately affect women since many more women than men find it necessary to attend school on a part-time basis and have primary child care responsibilities.

There is some question concerning to what extent single-sex fellowships will be allowed under Title IX.[53] Some people maintain that there should be no single-sex fellowships offered by or through an educational institution. They maintain that there is no more justification for single-sex scholarships than there is for scholarships limited to whites. Others maintain that institutions should be allowed to continue to offer single-sex scholarships that are part of a trust, will or bequest if they are "balanced" by an equal amount of money for the opposite sex.[54] Under this system, need would be determined regardless of sex, but single-sex scholarships could continue to be awarded, provided the *amount* of money individual students received was not affected by their sex. A number of people question whether such an option would be administratively feasible. In addition they argue that much of the benefit of receiving such scholarships is in the prestige connected with it, and that such a system would perpetuate past discrimination by allowing the most prestigious scholarships to continue to be for men only. A study of *Women in Fellowship and Training Programs* concluded that:

> Until women achieve a higher participation rate in [fellowship, internship, and other training] programs, many qualified women will lack one of the more important credentials necessary for career upward mobility. They will always be less "qualified."[55]

RULES AND REGULATIONS[56]

There are a variety of rules, regulations and policies which differentiate on the basis of sex and are almost certainly violations of Title IX. It is highly unlikely that the following types of rules and regulations could be justified under Title IX for any reason:

Different curfews or visitation hours for women and men.[57]

Appearance codes which set different standards based on sex (such as a requirement that boys have short hair, while girls are permitted to have either short or long hair).

Dress codes which set different standards for females and males (such as policies which permit males, but not females, to wear slacks).[58]

Different standards of punishment or different types of punishment based on sex (such as punishing females, but not males, who swear, or using corporal punishment on men only).

Forbidding unmarried mothers (but not unmarried fathers), from participating in extracurricular activities or athletic teams, or debarring unwed mothers from eligibility for awards or prizes.[59]

Restricting the options or participation (in classes, extracurricular activities, etc.) of persons (female or male) because of their actual or potential marital status.

Requiring that the prom queen, homecoming queen, etc. be a virgin.[60]

Footnotes at end of article.

In addition, automatically assuming that the residency of a woman is the same as her husband's can have an especially significant effect in state-supported institutions where the tuition is higher for out-of-state than for in-state residents.[61]

A number of institutions have rules or regulations which might be challenged under Title IX if they have a disproportionate impact on women. For example:

Rigid time limits for completing programs or degrees.

Lack of opportunity to attend school on a part-time basis. (Because many women have primary responsibility for child care, they are often unable to attend on a full-time basis.)

On-campus residency requirements.

Unavailability of leaves of absence for child rearing.[62]

Policies which make it difficult to transfer credits from one program or institution to another. (Women are more likely than men to attend several institutions because of their husbands' job changes.)

HOUSING RULES AND FACILITIES[63]

While this is not an issue at most elementary and secondary schools, the housing facilities and the options available to men compared to women are of importance at a number of post-secondary institutions.

Section 907 of Title IX specifically addresses one aspect of this issue:

> Notwithstanding anything to the contrary contained in this title, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.[64]

Although institutions are not required by Title IX to "integrate" their dormitories, they are prohibited from discriminating on the basis of sex in the options they offer their female and male students.[65]

Lack of dormitory space for one sex cannot be used as a means of limiting the number of students of that sex who are admitted. Housing rules have sometimes been used to deny women admission to an institution. For example, an institution may assign a smaller number of rooms to women, and then insist that all women live on campus (although male students are allowed to live off campus). If the institution uses the lack of dormitory space for women as a reason for limiting their admission, it violates Title IX.

Sex-based differences in housing options can take a number of forms:

Allowing men, but not women, to live off campus (or having different standards, such as grade point averages, for women and men to live off campus).

Offering one sex or the other a disproportionate share of the "most desirable" or most economical housing.

Offering women and men differential opportunities to live in housing which permits drinking, the presence of pets, etc.

Making dormitory suites, single rooms or large rooms differentially available to women and men.

Providing different supportive services (such as maid service, laundry facilities, recreation rooms, dining facilities, snack bars) to women and men.

Offering different options of residence hall governance based on sex.

Offering different security provisions based on sex (such as guards, locks on doors, etc.).

Offering different roommate selection procedures based on sex.

Offering married students different housing options based on sex.

Charging different housing fees based on sex.

Listing or otherwise perpetuating or endorsing housing which discriminates on the basis of sex.[66]

REQUIREMENTS FOR GRADUATION[67]

At present there are a surprising number of instances in which females and males are *required* to amass different credentials (or are able to amass the same credentials in different fashions) in order to graduate. These differences are especially pronounced in traditionally sex segregated physical education, home economics or shop classes. Examples of sex-based differentiation which no doubt violate Title IX include:

Requiring females to take home economics and requiring males to take shop or industrial arts. (Often, women cannot satisfy their requirements by taking shop and men cannot satisfy their requirements by taking home economics.)

Footnotes at end of article.

Having more required (as opposed to elective) courses for females than males. (For example, requiring women to take a course in home economics, with no similar requirement made of men.)

Requiring female and male students to have a different total number of courses, credits or hours to graduate.

Having different required courses for female and male physical education majors or requiring them to have different grade point averages to graduate (or to graduate with honors).

Allowing men, but not women, to exempt required physical education courses by taking a skills test or participating in varsity athletics.

Awarding academic credit to men, but not to women, who participate in interscholastic or intercollegiate athletics.

PHYSICAL EDUCATION AND EQUAL ATHLETIC OPPORTUNITIES[68]

Perhaps no issue concerning Title IX has generated as much heated debate and controversy as equality in sports and athletics. And perhaps nowhere else are the inequities as profound. Although money is by no means the sole measure of equality, gross inequities in the total amount of money spent on women's and men's sports can be used as a rough measure of discrimination. It is not unusual, for example, for the budget for men's athletics to be a hundred (or even a thousand) times greater than the budget for women's athletics.[69]

Many complex and difficult legal and educational questions are raised in the process of attempting to discern what constitutes equality for women in sports.[70] There are a number of unanswered questions concerning precisely what criteria and standards should be used to evaluate equal opportunity. In assessing whether it provides equal opportunity, an institution might examine its non-competitive programs, competitive (interscholastic or intercollegiate) programs, and (since physical education and athletic programs have traditionally been single-sex) employment patterns and administrative structures.[71]

In non-competitive and instructional programs, an institution might find bias in such areas as:[72]

Instructional opportunities and physical education classes.[73]

Sex-based requirements for physical education majors.

Requirements for graduation.

Intramural programs.

Recreational opportunities.[74]

Discrimination in competitive programs might occur in:[75]

The funding of programs (including the source of money, size of the budget and use of funds).

The provision of facilities and equipment.[76]

The availability of medical and training services and facilities.

Scheduling games and practice times.

The availability of funds for travel and per diem allowances.

Awarding athletic scholarships.

Recruiting athletes.

Media coverage.

The selection of sports and levels of competition.

The female/male composition of the team (single-sex versus mixed or coeducational teams).[77]

Some institutions have been reluctant to change policies and practices mandated by athletic conference or association rules, even though they have a discriminatory impact on women. Such regulations, however, *do not* alter the obligation of an institution to provide equal opportunity to women and men under Title IX. For example, the differential association or conference requirements for each sex concerning eligibility for financial aid or for participation in intercollegiate sports do not absolve the institution from the obligation to treat the sexes equally.[78]

Although HEW is reluctant to identify absolute criteria for determining compliance in this area, a number of Title IX complaints alleging sex discrimination in athletic opportunity have already been filed.[79] In the absence of detailed standards for assessing athletic programs, HEW will no doubt resolve complaints on a case-by-case basis.

Footnotes at end of article.

HEALTH CARE AND INSURANCE[80]

Most institutions offer their students some sort of compulsory or optional medical care and/or health insurance. These services and plans have come under considerable criticism, however, at a number of institutions for discriminating in one way or another against women. The areas most frequently cited as discriminatory involve pregnancy, gynecological care and family planning.[81] In general, it is reasonable to expect the criteria for identifying discriminatory treatment of these services and benefits among students to be consistent with already established criteria for making similar determinations among employees.

The principal of treating pregnancy for job-related purposes in the same manner as any other temporary physical disability is clearly stated in the employment area.[82] In the past, pregnant students have often been treated differently because of moral judgments about their pregnancy, rather than because of concern for their health.

Differential treatment of pregnant students may take a number of forms. For example, the following types of insurance coverage treat pregnancy differently from other temporary disabilities:

Excluding pregnancy altogether.

Providing more limited coverage of pregnancy than of other temporary disabilities.

Covering pregnancy only for women who are married and/or who have either a joint or "high option" policy.

Similarly, policies which cover vasectomies, but not sterilization for women, might be called into question under Title IX.

In addition, the following rules and policies concerning the treatment of pregnant students will undoubtedly be challenged under Title IX because they treat pregnancy differently from other physical disabilities:

Expelling pregnant students.[83]

Requiring pregnant students to enroll in special classes or to be tutored at home.[84]

Requiring pregnant students to leave school a certain number of months before childbirth or forbidding them from returning to school for a certain number of months after childbirth.[85]

Requiring pregnant students to have a doctor's certificate to either remain in or return to school, while not making similar requirements of students with other physical disabilities.

Requiring pregnant students to notify the institution of the expected date of childbirth, without similarly requiring individuals with other temporary disabilities to notify the instituton of the planned dates for surgery or absence.

Treating pregnant students differently, depending on their marital status.

The inability or unwillingness of institutional health care facilities to provide gynecological services has become an issue on a number of campuses. The absence or inadequacy of these services is likely to be raised under Title IX.

The lack or inadequacy of family planning and contraceptive services has also been a concern of students at many institutions. Title IX would neither require that an institution provide such services nor prohibit them from doing so, even if they were used by a different proportion of students of one sex than the other. If such services are provided, however, they cannot be offered for one sex only.

EMPLOYMENT OPPORTUNITIES[86]

Many institutions either offer their students some sort of employment or assist them in finding employment. Because of increased awareness of both Title IX and employment legislation, a number of institutions now include a section on student employment in their affirmative action plan.

Students employed by an educational institution are protected by the same antidiscrimination legislation and regulations which cover other employees: Executive Order 11246, Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. These laws prohibit any differences on the basis of sex (and, in most instances, on the basis of race, color, religion and national origin as well) in hiring, upgrading, salaries, fringe benefits, training and all other conditions of employment.[87]

Footnotes at end of article.

Sex bias in student employment can manifest itself in a number of ways. For example at a coeducational ivy league university, a woman who applied for a job in the university greenhouse was told that she could not be hired to work there because "girls kill the plants." In addition, the following are among the practices which would violate these laws and regulations:

Routinely assigning women students to secretarial jobs and men to the (often higher paying) grounds and building crew.

Refusing to hire women students (or discouraging them from applying) for particular jobs.[*]

Student placement services which accept job opportunities limited to one sex not only violate Title IX, but other laws as well. However benign the intent, this breakdown virtually always limits the job opportunities of women students. For example, relatively low paying jobs (such as secretarial work and teaching) are listed for women, while the better jobs (such as engineering and middle-management positions) are listed for men. Placement services (including student placement services) are likely to be challenged under Title IX if they:

Accept job offers limited to one sex only.

Allow recruiters on campus who refuse to interview women or otherwise discriminate against women.

Allow employers to recruit on campus who routinely offer similarly qualified females and males different jobs or salaries.

Refer only males to fields which are predominantly "male," while referring females to fields traditionally thought of as "feminine."

APPOINTMENTS OF WOMEN TO COMMISSIONS AND COMMITTEES [*]

Oftentimes administrators or teachers are called upon to appoint students to commissions, committees or governing bodies of one sort or another. In the past, the bulk of these appointments (especially the most prestigious or powerful appointments) have been given to males. Under Title IX institutions will have the obligation to assure that these appointments are made on a nondiscriminatory basis and that women are given a full and equal opportunity to participate in these capacities.

IMPLICATIONS OF TITLE IX FOR "PRIVATE" GROUPS WHICH DISCRIMINATE ON THE BASIS OF SEX [*]

There has been considerable discussion concerning the degree to which Title IX covers private organizations or groups which may operate in or be assisted by educational institutions. For example, there has been some disagreement concerning the coverage of Little League teams, honorary organizations, professional organizations, community recreation groups and social sororities and fraternities. The legislative history of Title IX provides little guidance concerning Congressional intent in this area.

Some people argue that the regulations should bar any institution from assisting in any way any person or agency which discriminates on the basis of sex. The proponents of this point of view stress that this approach would be consistent with the interpretation with regard to racial discrimination under Title VI of the 1964 Civil Rights Act.[*] They note that excluding females from such activities as Little League, professional organizations and honorary societies could cause real danger to women. They also point to the paradox of allowing a group which discriminated on the basis of sex to use institutional facilities (or otherwise receive support from the institution), while denying the same privileges to a group which discriminated on the basis of race.[*]

Others maintain that private groups which discriminate should not be covered at all by Title IX, since in general they operate after school hours. However, because these groups are covered under Title VI *vis a vis* race discrimination, this argument is extremely weak.

Still others take the position that whether or not a private group which discriminates on the basis of sex should be allowed to receive support from an institution should depend on the substantiality of the relationship between the institution and the private group, the extent to which the group provides aid or services to the students and employees of the institution, and the degree to which the activities of the group are related to the institution's education programs or activities.[*] This argument maintains that whether or not a group is covered should depend on how closely its activities are related to the activities of the institution. Opponents of this position point out that it is conflict with the precedents set under Title VI and that, if the government adopted this position, it would be bowing to pressure. Moreover, this position could lead to inconsistent situations. For example, it is possible that a discriminatory Little League team might be permitted to use college facilities, but be denied the similar use of elementary school facilities under this interpretation.

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[*] Footnotes at end of article.

Although the Title IX regulations clarify the criteria for determining compliance in this area to some degree, a number of the specific complaints brought because of discrimination in such organizations are likely to be resolved on a case-by-case basis.

EDUCATIONAL CONSORTIA AND COOPERATIVE PROGRAMS [94]

A number of institutions either require or permit students to participate in cooperative programs or educational consortia (for example, student teaching assignments or credit for work experience). The requirements of Title IX forbidding sex discrimination cover such cooperative efforts. That is, an educational institution cannot assist another institution or organization in discriminatng against its students, even if that organization is not covered by Title IX. The institution bears the obligation to assure nondiscrimination against its students, much as a federal contractor must assure that its subcontractors not discriminate under Executive Order 11246. If an institution is not able to assure nondiscrimination against its students, it would appear that it must withdraw from the cooperative program or activities.

EXTRA-CURRICULAR ACTIVITIES [95]

There is little question that extra-curricular activities are an integral part of the education program offered by an institution and, as such, are subject to the nondiscriminatory provisions of Title IX. An institution which sponsored, supported or endorsed single-sex (or otherwise discriminatory) extra-curricular activities, clubs or programs would be vulnerable to charges of discrimination under Title IX.

TEXTBOOKS AND CURRICULA [96]

Textbooks from *Dick and Jane* to medical school anatomy texts have come under fire for portraying women in a biased, stereotyped manner. In a study of government texts,[97] Jennifer Macleod and Sandra Silverman identify three ways in which these books perpetuate discrimination:

Women are rarely mentioned in the texts. The authors of the study found that the texts failed to discuss individual women, to quote women, to include a reasonable number of women in illustrations and to use women's case histories as examples.

Illustrations and texts were often condescending and perpetuated stereotyped roles. The authors found numerous examples of undesirable stereotypes concerning women and women's roles. For example, women in the texts were "often defined as their husband's wives rather than as individuals in their own right; sometimes women [were] dehumanized as sex objects." [98]

Finally, the texts ignored much of the subject matter dealing with women. For example, they rarely mentioned famous women, women's suffrage or the women's movement.

A number of studies of texts used at all levels draw similar conclusions.[99] For example, the Association of Women in Science (AWIS) forced publishers Williams and Wilkins to recall *The Anatomical Basis of Medical Practice* because of its portrayal of women. This text contained a variety of passages that AWIS labeled discriminatory. For example:

If you think that once you have seen the backside of one female, you have seen them all, then you haven't sat in a sidewalk cafe in Italy where girl watching is a cultivated art. Your authors, whose zeal in this regard never flags, refer you to Figures 111-50 and 53 as proof that female backs can keep an interest in anatomy alive.

Thus, the "little bit" of difference in a woman's built-in biology urges her to ensnare a man. Such is the curse of estrogen.[100]

Footnotes at end of article.

Differential treatment of women and men is generally more easily identified in textbooks than in most other curricula materials. Similar discrimination, however, may occur in the classroom in a variety of more subtle ways. For example, students at Western Michigan University have cited the following examples of teacher comments which discriminate against women:

A biology teacher during a class field trip passed a junk car lot and said, "Well, there's women's biggest contribution to the world."

Another professor told a woman student, "Don't worry, with your body, you'll get whatever you want."

And still another professor made this remark, "Now that there are permapress shirts, dishwashers and garbage disposals, etc., women aren't needed."[101]

Although there is little question that a wide variety of textbooks and curricula are in one way or another sex biased and perpetuate discrimination, it is not clear precisely what strategy HEW will adopt to remedy this discrimination.

Some persons argue that HEW should take immediate and direct steps to eliminate this sort of stereotyping. However, there is a strong reluctance on the part of many government officials to intervene in issues involving textbooks and curricula. Both HEW and so many educators fear that strong enforcement in this area might jeopardize the autonomy and academic freedom of local education agencies and institutions. They believe that such programmatic decisions should be made at the local, not the federal, level. In addition, they feel that the statutory mandate to overcome discrimination does not override the guarantees of free speech under the First Amendment.[102]

Others advocate the position that, although the government should not make such judgments directly, it should require institutions to have internal procedures and mechanisms for reviewing materials and curricula.[103] They think that the government should require institutions to establish internal mechanisms both to ensure that their curricula do not reflect discrimination and to resolve complaints alleging sex discrimination in the curricula. Advocates of this position maintain that, since it avoids having the federal government itself determine what is discriminatory, the First Amendment criticism mentioned earlier does not apply.

A third position is that the government should administratively delay any decision on this issue indefinitely. The probable eventual result of this tactic would be a suit by women's groups against HEW for not enforcing the provisions of Title IX. This would leave the resolution of this issue in the hands of the courts, which many people feel is a more appropriate vehicle for this decision than a government agency. Finally, some people argue that the government should overtly refuse to address the issue at all, perhaps even inviting a "sweetheart suit" to resolve the issue in the courts.[104]

Whatever strategy the government adopts, the issue of sex discrimination that is perpetuated by stereotyping in textbooks and curricula promises to be both controversial and unavoidable in the long run. A number of Title IX complaints in this area have already been filed.[105]

THE COUNSELING OF STUDENTS[106]

While there is little question that it is important for an institution to provide its students with unbiased counseling, there is considerable disagreement concerning how this might most appropriately be accomplished. Sex bias in counseling is perhaps even more difficult to identify and rectify than bias in textbooks or curricula. The arguments both for and against government intervention in counseling parallel those discussed in the preceding section. Because of the subtle nature of discrimination in this area, the government is even less likely to intervene in counseling programs than in the area of textbooks and curricula.

Although counseling programs alone cannot take the blame or credit for the career and personal choices students make, they typically mirror the attitudes of the institution towards women. Often sex bias is transmitted by well-meaning counselors who pass on stereotypes about men and women. They may be unaware of the growing body of research which is shedding new light on motivation and achievement in women. Often counselors are trained only to work with the "traditional" student, a label which often does not apply to older women returning to complete their education or women with child care and family responsibilities.[107]

No matter what stand HEW takes on direct (or indirect) intervention to alleviate sex bias in counseling, voluntary steps by schools would be consistent with both the spirit and letter of Title IX. For example, they might develop programs to train their counselors to be more sensitive to their own biases and those in the materials they use.

A similar issue is posed by bias in the tools that counselors might use: interest inventories, catalogs, tests, occupational materials, etc. These instruments can perpetuate stereotypes which limit the options of women and men. For example, in 1972 the American Personnel and Guidance Association passed a resolution calling for the revision of the widely-used Strong Vocational Interest Blank because it perpetuated discrimination against women. Althought the APGA focused on the Strong, the pattern is consistent from one instrument to another.[108] It is likely that advocacy groups will use the momentum for change generated by Title IX to encourage schools, colleges and testing companies to reassess and revise counseling tools to assure that they do not perpetuate sex bias.

SINGLE-SEX COURSES AND PROGRAMS [109]

A number of educational institutions at all levels have one or more courses which are open to one sex only. For example, many high schools offer home economics to females only and industrial arts to males only. In almost all instances such practices violate Title IX.[110] This prohibition has significance for a variety of courses: health, physical education, business, vocational, technical, industrial arts, home economics, music, as well as continuing and adult education courses.

Often the argument used for refusing to admit one sex or the other is the lack of duplicate facilities (such as bathrooms, dressing rooms or locker rooms). While bathroom and locker room space may have to be reallocated or shared by both sexes on the alternating basis (similar to the arrangements in airplanes and trains), the lack of duplicate facilities cannot be used as a reason for excluding one sex or the other. In any event, Title IX does not require women and men to undress in front of one another or to share the same bathroom at the same time.[111]

Because of different interest patterns between women and men, it is likely that some classes will continue to be made up either entirely or primarily of members of one sex. Women's groups are urging institutions to assure that classes or programs which enroll primarily men not receive preference over those which enroll primarily women in such areas as facilities and equipment, scheduling of classes or teacher competence.

Some women's groups are stressing that institutions be on guard not to offer courses which might have the effect of discriminating against women. For example, if an institution offered coaching instruction only for predominately male sports, it might leave itself vulnerable to criticism and charges of illegality.

VOCATIONAL DEUCATION PROGRAMS [112]

Many of the vocational education programs and courses in schools have been (and still are) sex segregated.[113] Tracking, as well as overt discrimination, will no doubt be strongly challenged under Title IX. Given that Title IX specifically prohibits sex discrimination in admissions to *all* vocational schools, including vocational high schools, these programs will come under strong legal (as well as moral) pressure to open their doors and programs to women and men on an equal basis. Indeed, because of both constituted challenges and Title IX, a number of schools have already changed their policies and programs.

WOMEN'S STUDIES PROGRAMS AND COURSES [114]

It is reasonable to expect the number of women's studies courses and programs to increase as the press for equality for female students increases. There are now more than 4000 such courses in existence and they will no doubt continue to flourish.[115] These programs are likely to be challenged under Title IX, however, if they exclude men.[116]

For a variety of reasons (including the reticence of the government to intervene in matters involving curricula), HEW is not likely to mandate that an institution have a women's studies program or women's studies courses. However, in the event that a Title IX complaint is filed, the government is likely to consider the existence of a women's studies program (or courses) as a sign of commitment to the education of women or as remedial or affirmative action.[117]

WOMEN'S CENTERS [118]

A number of colleges and some high schools have "women's centers" of one sort or another which provide supplementary services for the women in the

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Footnotes at end of article.

institution.[119] It is well within the scope of Title IX to have a center focusing on women. However, under Title IX, it is not likely that a center could exclude men from using its services or participating in its activities. In general, this should not pose a threat to women's centers, because the few men who would use the center are likely to be sympathetic to women's issues.

FLEXIBLE PROGRAMS [120]

Opportunities to pursue a degree in a "nontraditional" manner or at a "nontraditional" pace are often especially important to women. Most college programs were originally designed to meet the needs of young males who had few, if any, home or parental responsibilities. Consequently, they are often not tailored to meet the needs of any of the so-called "nontraditional" students—women, minorities, older students, etc.

For a variety of reasons (including academic freedom and the First Amendment issues raised earlier), it is doubtful that HEW would require that an institution offer flexible programs. However, if these programs are especially beneficial to women, HEW is likely to regard their presence as a positive factor in evaluating an institution's compliance with Title IX.

CONTINUING EDUCATION PROGRAMS [121]

The lack of opportunity for older students to attend school is a factor which is likely to have a disproportionate impact on women. Because fewer qualified women than men go to college or graduate school, older women returning to college make up the largest single group of potential new students. Many institutions are finding that one of the easiest ways to increase their lagging enrollment without diluting academic standards is to develop programs and services which facilitate the reentry of these women into academia.

Although Title IX will probably not require an institution to provide such services, the government may look at the presence (or absence) in determining overall compliance with Title IX. Again, although many of these programs were specifically designed to meet the needs of women, it is doubtful whether men could be excluded from them under Title IX. In fact, a number of "Continuing Education for Women" programs already admit men.

CHILD CARE FACILITIES [122]

Although the trend is towards more equal sharing of work both in the home and in the labor force, most women still bear the principal responsibility for child rearing. Therefore, the lack of child care facilities almost always affects female students (and employees) disproportionately. In assessing compliance with Title IX, HEW is likely to view the presence of such facilities as a positive indication of the institution's concern for women.

There are a number of unanswered questions concerning the specific implications of Title IX of the Education Amendments of 1972. There is no question, however, that educational institutions now have a clear and strong federal mandate to eliminate sex discrimination against students, as well as employees.

FOOTNOTES

[1] The authors wish to express their appreciation to Jeffrey H. Orleans, formerly an attorney with the Department of Health, Education and Welfare and currently with the Equal Employment Opportunity Commission, for his helpful comments on drafts of the manuscript.

[2] Education Amendments of 1972 Sections 901–907, 20 U.S.C. Sections 1681–86 (1972).

[3] *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

[4] In *Sweatt* v. *Painter*, 339 U.S. 629 (1950), the Supreme Court unanimously ordered that black students be admitted to the University of Texas Law School. In *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637 (1950), the Supreme Court unanimously ordered that the black student-plaintiff "receive the same treatment at the hands of the state as students of other races." Similarly, in *Brown* v. *Board of Education of Topeka*, 347 U.S. 843 (1954), the Supreme Court found that "separate educational facilities [on the basis of race] are inherently unequal." In contrast, six years after the *Brown* decision, in *Allred* v. *Heaton*, 336 S.W. 2d 251 (Tex. Civ. App., 1960), *cert. denied*, 364 U.S. 517 (1960), the

Supreme Court let stand a lower court decision prohibiting a woman from being admitted to Texas A and M (then an all-male institution) to pursue a course of study which was not offered at any other publicly supported institution. Similarly, in *Williams* v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970) *aff'd. mem.*, 401 U.S. 951 (1971), the Supreme Court affirmed a lower court decision upholding the right of a state to maintain a women's college. In *Kurstein v. Rector & Visitors of the University of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) however, women were granted admission to the previously all-male college of the University. For a general review, see Shaman, "College Admission Policies Based on Sex and the Equal Protection Clause," 20 *Buffalo L. Rev.* 609 (1971). No cases involving sex discrimination against students in educational institutions in areas other than admissions have been heard by the Supreme Court.

[5] Public Health Service Act, Section 799a and Section 845, 42 U.S.C. Section 295h-9 and Section 298b-2 (as added by the Comprehensive Health Manpower Training and Nurse Training Acts of 1971). The Act covers, but is not limited to, schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, allied public health personnel and nursing. In addition, regulations issued in June 1972 (45 CFR Part 83) by the Secretary of Health, Education, and Welfare specify that *all* entities (including hospitals) applying for awards under Titles VII and VIII of the Public Health Service Act as subject to the nondiscrimination requirements.

[6] As of July 1974, final regulations for these amendments had not been issued. Draft regulations, proposed 45 CFR Part 83, were published in the *Federal Register* on September 20, 1973. 38 *Fed. Reg. 26, 384–89.*

[7] The legislative history of Sections 799a and 845 of the Public Health Service Act, 42 U.S.C. Section 295h-9 and Section 298b-2, is found at 117 Cong. Rec. 23,222–64, 25,119–22, 25,181–86 (1971). It would be inconsistent with the intent of this legislation to admit students in a nondiscriminatory manner to a program which subsequently treated them discriminatorily. In addition, sex discrimination against students already enrolled in a program might significantly discourage qualified students from applying because of their sex.

[8] Education Amendments of 1972 Sections 901–907, 20 U.S.C. Sections 1681–86 (1972). As of July 1974, final implementing regulations for Title *IX* had not been issued. For a copy of the *proposed* regulations (45 C.F.R. Part 86), see 39 Fed. Reg. 22, 228–40 (June 20, 1974) or write to the Director, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C. 20201. The comment period for the proposed regulations ends October 15, 1974.

[9] Federal financial assistance includes, but is not limited to, a grant or loan of federal funds (including funds for construction or repair of buildings or facilities scholarships, loans, grants, wages or other funds extended to an institution for payment to, or on behalf of, students; or scholarships, loans, grants, wages or other funds extended directly to a student for payment to an institution); a grant of federal real or personal property, including surplus property; provision of the services of federal personnel; or the sale or lease of federal property at a nominal cost.

[10] For an excellent section-by-section analysis of Title IX and a suggested legal framework in which to evaluate separate or different treatment of the sexes in educational activities, see Alexandra Polyzoides Buek and Jeffrey H. Orleans, "Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972," 6 *Conn. L. Rev.* 1 (1973) [hereinafter cited as Buek and Orleans].

[11] Education Amendments of 1972 Section 901(a), 20 U.S.C. Section 1681 (1972).

[12] Specifically, Title IV of the 1964 Civil Rights Act was amended to include sex as a category of discrimination in school assignment in determining whether the U.S. Attorney General may bring action upon receiving a complaint of discrimination involving admission or continued attendance at a public institution. Title IX of the 1964 Act was amended to include sex as a category of discrimination under which the Attorney General may intervene in an action commenced in any federal court seeking relief from denial of equal protection of the laws.

[13] Also, coverage under the Fair Labor Standards Act was extended to individuals employed in preschools and outside salespersons.

[14] As of July 1974, no regulations had been issued to enforce this provision.

[15] Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (1964).

[16] (1) Certain schools are exempt from Title IX, while there are no such exemptions under Title VI; (2) Title VI has certain exemptions from its coverage

of employment discrimination, while Title IX does not; (3) Title IX is restricted to federally assisted *education* program, while Title VI covers all federally assisted programs.

[17] The obligation of an institution to comply with the provisions of Title IX is in no way obviated or alleviated by any state or local law or other requirement which allows or requires discrimination. Similarly, rules or regulations of any organization, club or athletic league or association do not alter an institution's Title IX obligations. See Subpart A, Section 86.6 of the proposed regulations.

[18] If an educational institution is composed of more than one school, college or department which are administratively separate units, admissions to each unit are viewed separately under Title IX. See text accompanying notes 35–41 *supra*.

[19] The reader is reminded that there are no similar exemptions under the amendments to the PHSA for federally financed health training programs subject to those provisions.

[20] Since the passage of Title IX, the Maritime Administration has changed its admission policies so that women are now admitted to the U.S. Merchant Marine Academy at Kings Point, New York.

[21] Although HEW attempts to keep the names of complainants confidential, women are increasingly filing complaints through third parties or advocacy groups because they fear harassment. Although such harassment is prohibited, it is often very subtle and consequently difficult to document.

[22] 20 U.S. 1682.

[23] These procedures are expected to be described in some detail in the final implementing regulation for Title IX. See Subpart F of the proposed regulations.

[24] This is consistent with the regulations to Title VI of the 1964 Civil Rights Act as amended in July 1973. 45 CFR Part 80.

[25] Title IX, 20 U.S.C. 1681(b), provides that: Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program activity, in comparison with the total number or percentage of persons of that sex in any community, State, section or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

[26] The Supreme Court has recently avoided the issue of deciding whether, in the absence of proven discrimination, the Equal Protection clause of the Fourteenth Amendment permits an institution to use different criteria for admitting white and minority students. See *DeFunis v. Odegaard*, 94 S.Ct. 1704 (1974).

[27] In a number of employment cases, the courts have ruled that individual capabilities, not on the basis of characteristics attributed to the group to which they belong. See, for example, *Weeks v. Southern Bell Telephone and Telegraph*, 408 F. 2d 228 (5th Cir. 1969) and *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971).

[28] 401 US. 424 (1971).

[29] See Subpart C, Section 86.23 of the proposed regulations.

[30] A number of institutions are now making special efforts and developing special materials to recruit women, especially for traditionally "male" fields. For example, at Stanford University female students in the graduate business program recruit women undergraduates. Similarly, Rensselaer Polytechnic College has a woman on its admissions staff who, among other things, encourages prospective women students to speak with females already enrolled. In addition, recruiters are beginning to recruit more actively at female high schools and colleges.

[31] See Margaret Dunkle, "Grading the College of Your Choice," *Ms.*, June 1974, 101.

[32] See Subpart C, Sections 86.14–86.22 of the proposed regulations.

[33] In this section, the authors have drawn heavily from the unpublished paper "Expanding Opportunities for the Admission of Women in Graduate and Professional Schools Through Implementation and Enforcement of Title IX" by Gary R. Bachula, which was written while he was a student at Harvard Law School (May 7, 1973). Also see David Leslie, "Emerging Challenges to the Logic of Selective Admissions Procedure," 3 *Journal of Law and Education* 203 (1974).

[54] Similarly, an understanding of bias in admissions aids in understanding discriminatory procedures and policies which may also exist in terms of selection of students for special programs either within the school or outside the school where the institution plays a role in the selection process (for example, summer science programs).

[55] Recruitment policies and procedures are exempt from the nondiscrimination provisions of Title IX to the same extent that admissions policies are exempt.

[56] For a discussion of the legislative history of these exemptions, see Buek and Orleans, *supra* note 10, text accompaning notes 12–18, 47–51.

[57] Single-sex elementary and secondary schools have been challenged on Constitutional grounds. Compare *Bray* v. *Lee*, 337 F. Supp. 934 (D. Mass. 1972). Subpart C, Section 8634(b) of the proposed regulations provides that:

> A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:
>
> (1) any institution of vocational education operated by such recipient; or
>
> (2) any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools

[58] If single-sex public institutions decide to admit both sexes, they have up to seven years to admit female and male students on a nondiscriminatory basis provided that their plans are approved by the Commissioner of Education.

[59] There is some speculation that the passage of the Equal Rights Amendment would either abolish or significantly limit these admissions exemptions. It seems fairly certain that the exemptions for public single-sex undergraduate institutions and nonvocational public elementary and secondary schools would be negated by the passage of the Equal Rights Amendment. The effect of the amendment on the exemption for *private* undergraduate institutions (both single-sex and coeducational) is less clear and would depend on court interpretation of the degree of "state action" involved. For a further discussion of this issue, see Monica Gallagher, "Desegregation: The Effect of the Proposed Equal Rights Amendment on Single-Sex Colleges," 18 *St. Louis Univ. L. J.* 41 (1973).

[60] The question of the applicability of Title IX to discriminatory admissions in *private undergraduate schools which provide professional or vocational training* is, at this point not clear. Some argue that, since Title IX clearly covers vocational and professional education, these programs must have nondiscriminatory admissions exemption for private undergraduate schools exempts these programs. The proposed regulations for Title IX take the latter position.

[61] Single-sex graduate, professional and vocational schools at all levels have until July 1979 to achieve nondiscriminatory admissions, provided their plans are approved by the Commissioner of Education.

[62] *Supra* note 28.

[63] 401 U.S. at 431.

[64] 401 U.S. at 436.

[65] For a more detailed discussion of this, see Buek and Orleans, *supra* note 10, text accompanying notes 72–84.

[66] Phi Delta Kappa changed its policy of excluding women after the Women's Equity Action League (WEAL) filed charges of sex discrimination under Title IX against 25 institutions that sponsored chapters of the honorary.

[67] See Subpart C, Section 86.22 of the proposed regulations.

[68] Despite myths that older women are poor risks as students studies show that their dropout rate is lower and their grades higher than "typical" students. See Melissa Lewis Richter and Jane Banks Whipple, *A Revolution in Education: Ten Years of Continuing Education at Sarah Lawrence College* Sarah Lawrence College, Bronxville, N.Y., 1972.

[69] Letters of recommendation, particularly for admission to graduate and professional schools, need to be evaluated in the context of the "protege" system. Often faculty members "sponsor" students, training them in the formal and informal systems of their future professions. For a variety of reasons, women typically have less interaction with faculty and are therefore less likely than males to benefit from this system and to have strong letters of recommendation. Regarding alumi/ae recommendations for minority students, see *Merideth* v. *Fair*, 298 F. 2d 696 (5th Cir. 1962).

[70] See Subpart D, Section 86.35 of the proposed regulations.

[71] The reader is reminded that Title IX applies to the education activities and programs of entities receiving federal funds. Financial aid which is administered by a group outside the institution and which the institution in no way endorses,

approves, lists or perpetuates is not covered by the anti-discrimination requirements of Title IX. However, Title IV of the Education Amendments of 1972 prohibits lenders who use the Student Loan Marketing Association from discriminating on the basis of sex, color, creed or national origin.

[52] See Elizabeth W. Haven and Dwight H. Horsch, *How Students Finance Their Education: A National Survey of the Educational Interests, Aspirations and Finances of College Sophomores in 1969–70*, College Entrance Examination Board, New York, 1972; and Helen S. Astin, "Career Profiles of Women Doctorates," in Rossi and Calderwood (eds.), *Academic Women on the Move*, Russell Sage Foundation, Hartford, Conn., 1973.

[53] Subpart D, Section 86.35 of the proposed regulations prohibits single-sex scholarships, fellowships and other financial assistance *except* if the single-sex financial assistance is (1) "established under a foreign will, trust, bequest, or similar legal instrument or by a foreign government" or (2) "provided as part of separate athletic teams for members of each sex." Both of these exceptions are coming under heavy criticism from women's groups.

[54] A public agency cannot administer a will which discriminates on the basis of race. See *Pennsylvania v. Board of Trustees*, 353 U.S. 230 (1957).

[55] Cynthia L. Attwood, *Women in Fellowship and Training Programs*, Association of American Colleges, Washington, D.C. 1972, at 15.

[56] See Subpart D, Section 86.31 of the proposed regulations.

[57] *But compare Robinson v. Board of Regents of Eastern Kentucky University*, 475 F. 2d 707 (6th Cir. 1973), *cert denied*, 94 S. Ct. 2382 (1974), with Buek and Orleans, supra note 10, text accompanying notes 19–25.

[58] Although it is clear that Title IX covers this issue, there is some debate concerning the appropriate test to be used to determine compliance. Some people argue that there should be identical rules for any aspect of appearance for men and women. (For example, if long hair is permitted for females, it must be permitted for males as well.) Others argue for the "community standards" approach, where allowable dress might differ according to sex, provided that the community standards concerning dress were applied with equal diligence for both sexes. Opponents of the "community standards" approach argue that it would merely perpetuate discrimination by allowing the community to sanction differential standards for men and women. In addition, they cite the difficulty in fairly determining just what "community standards" are.

[59] Since it is impossible to identify unwed fathers with any certainty and consistency, even a policy which ostensibly applied to all "unwed parents" is probably impermissible under Title IX.

[60] In the fall of 1973, seventeen year old Sharon Boldman was ruled off the Urbana (Ohio) High School homecoming queen ballot by her school principal who said, "Only virgins can run for homecoming queen." Mrs. Boldman was the mother of an infant daughter born out of wedlock.

[61] A policy basing a woman's tuition rate on her husband's residency status was voided in *Samuel v. University of Pittsburgh et al.*, ——— F. Supp. ——— (W.D. Pa., No 71–1202. April 10, 1974).

[62] The parallel provision for employment can be found in Office for Civil Rights, U.S. Department of Health, Education and Welfare, *The Higher Education Guidelines, Executive Order 11246*, at 13 (37 Fed. Reg. 24686 *et seq.*, Nov. 18, 1972):

> If employees are generally granted leave for personal reasons, such as for a year or more, leave for purposes relating to child care should be considered grounds for such leave and should be available to mean and women on an equal basis.

[63] See Subpart D, Sections 86.31(b)(6) and 86.32 of the proposed regulations.

[64] Education Amendments of 1972 Section 907, 20 U.S.C. (1972).

[65] See Subpart D, Section 86.33 of the proposed regulations.

[66] See Subpart D, Section 86.32(e) of the proposed regulations.

[67] See Subpart D, Section 86.31 of the proposed regulations.

[68] See Subpart D, Sections 86.38, 86.35(d) and 86.34(a) of the proposed regulations.

[69] Subpart D, Section 86.38(f) of the proposed regulations states that "Nothing in this section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex."

[70] For a discussion of the legal implications of sex discrimination in athletics in educational institutions, see Rubin, "Sex Discrimination in Interscholastic High School Athletics," 25 *Syracuse L. Rev.* 535 (1974).

[71] For a detailed discussion of discrimination in sports in educational institutions, see Association of American Colleges, Project on the Status and Education of Women, *What Constitutes Equality for Women in Sports? (Federal Law Puts Women in the Running)*, Washington, D.C., April 1974.

[72] In general, the proposed regulations require complete "integration" for non-competitive and instructional programs. See Subpart D, Section 86.38 and 86.34 of the proposed regulations.

[73] Subpart D, Section 86.34(a) of the proposed regulations specifically prohibits single-sex classes or courses, including health and physical education courses.

[74] Employees might also challenge recreational opportunities which differentiate on the basis of sex as discriminatory fringe benefits.

[75] On May 20, 1974 Republican Senator John Tower of Texas introduced a bill (as an amendment to the Elementary and Secondary Education Act) to amend Title IX so that it would "not apply to an intercollegiate athletic activity to the extent that such activity does or may provide gross receipts or donations to the institution necessary to support that activity." The effect of this amendment would have been to exclude virtually all intercollegiate (but not interscholastic) athletic activities from Title IX coverage. The Tower amendment was deleted from the bill in the House-Senate conference committee.

[76] Subpart D, Section 86.38(e) of the proposed regulations states that "A recipient which operates or sponsors separate teams for members of each sex shall not discriminate on the basis of sex therein in the provision of necessary equipment or supplies for each team or in any other manner."

[77] Subpart D, Section 86.38(a) of the proposed regulations allows "separate teams for members of each sex where selection is based on competitive skill."

[78] See Subpart A, Section 86.3(c) of the proposed regulations.

[79] For example, the University of Wisconsin, the University of Michigan and the University of Minnesota have had Title IX complaints alleging discrimination in athletics filed against them.

[80] See Subpart D, Sections 86.36 and 86.37, and Subpart E, Section 86.46 of the proposed regulations.

[81] See Association of American Colleges, Project on the Status and Education of Women, *Health Services for Women: What Should the University Provide?* Washington, D.C., June 1972.

[82] The *Guidelines on Discrimination Because of Sex*, the Equal Employment Opportunity Commission, states:

> Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities. [29 CFR 1604.10]

Also see notes 85 *infra*.

[83] See *Ordway* v. *Hargraves*, 323 F. Supp. 1115 (D. Mass. 1971).

[84] There would be no bar under Title IX to permitting pregnant students to attend separate classes or to be tutored at home, provided the same options were open on the same basis to students with other temporary physical disabilities. See, however, the legislative history at 188 Cong. Rec. 2747 (daily ed. Feb. 28, 1972).

[85] In January 1974, the Supreme Court ruled that school boards violated the due process clause of the Fourteenth Amendment by maintaining and enforcing mandatory maternity leave policies requiring teachers to leave their jobs four and five months before childbirth. *Cleveland Board of Education et al.* v. *LeFleur et al.*, 94 S. Ct. 791 (1974). But in *Geduling* v. *Aiello et al.*, — U.S. — (1974), the Court ruled that it was not unconstitutional for a state disability insurance program to exclude pregnancy from coverage.

[86] See Subpart D, Section 86.35 and Subpart E of the proposed regulations.

[87] For a free copy of a chart prepared by the Project on the Status and Education of Women that outlines *Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions*, write to the Public Information Office, Office for Civil Rights, Department of Health, Education, and Welfare, Washing-

ton, D.C. 20201. See also Bernice Sandler, "Sex Discrimination, Educational Institutions, and the Law: a New Issue on Campus," 2 *Journal of Law and Education* 613 (1973).

[88] A job can be limited to one sex only if sex can be proven to be a "bona fide occupational qualification" (bfoq). The courts have interpreted this exemption very narrowly: for example, acceptable bfoq's are "lingerie fitter" and "rest room attendant" (provided that attendant is in the rest room while it is in use).

[89] See Subpart D, Section 86.31 of the proposed regulations.

[90] *Id.*

[91] Section 804(b) of the Higher Education Act of 1965, P.L. 89–329 ("Waggoner Amendment") provides that:

Nothing contained in this Act or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the membership practices of internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institutions.

Under Title VI, no institution/recipient of federal assistance may assist any person or agency in practicing racial discrimination, whether or not its activities are related to the activities of the recipient. HEW's policy under Title VI has been consistent no matter what form "support" takes. For example, recipients may not do such things as allow a racially segregated social organization, student activity or professional fraternity to use a school facility to conduct its activities.

[92] Race discrimination has been held to be unlawful in *Sigma Chi* v. *Regents of University of Colorado*, 258 F. Supp. 515 (D.C. Colo. 1966); *Webb* v. *State University*. 129 F. Supp. 910 (N.D.N.Y. 1954), appear dismissed.

[93] This is the interpretation articulated in the introduction to the proposed regulations by the Secretary of HEW.

[94] See Subpart D, Section 86.31(c) of the proposed regulations.

[95] See Subpart D, Section 86.31 of the proposed regulations.

[96] The proposed regulations deliberately do not mention the issue of sex stereotyping and discrimination in textbooks and curricula. See the introduction to the proposed regulations by the Secretary of HEW.

[97] Jennifer MacLeod and Sandra Silverman, *You Won't Do; What Textbooks on U.S. Government Teach High School Girls*, KNOW, Inc., Pittsburgh, 1973.

[98] *Id. at 24.*

[99] For further information, see Saario, Jacklin and Tittle, "Sex Role Stereotyping in the Public Schools," 43 *Harv. Ed. Rev.* 386 (1973).

[100] Letter from Estella R. Ramey to Membership of Association for Women in Science, August 1, 1972.

[101] Association of American Colleges, Project on the Status and Education of Women, *On Campus With Women*, No. 7, Washington, D.C., December 1973, at 9.

[102] The proposed regulations adopt this position. See the introduction to the proposed regulations by the Secretary of HEW.

[103] The January 1974 unpublished draft of the Title IX regulations adopted this position.

[104] That is, a suit in which the parties agree to initiate litigation in order to obtain a judicial determination of their respective rights.

[105] For example, at the University of Wisconsin, a group of women medical students has filed charges of sex discrimination under Title IX, claiming that a professor's remarks showed disrespect for women medical students. The women supported their claims with tape recordings.

[106] Although the proposed regulations do not address the issue of sex discrimination in counseling in any detail, Subpart D, Section 86.34(c) requires nondiscriminatory appraisal and counseling *materials*.

[107] See John Pietrofessa and Nancy K. Schlossberg, "Perspectives on Counselor Bias: Implications for Counselor Education," 4 *Counseling Psychologist* 44 (1973) and I. K. and D. M. Broverman, F. E. Clarkson, P. S. Rosenklatz and S. R. Vogel, "Sex Role Stereotypes in Clinical Judgments of Mental Health," 34 *Journal of Consulting and Clinical Psychology* 1 (1970).

[108] Pietrofessa and Schlossberg at 49.

[109] See Subpart D, Section 86.34 of the proposed regulations.

[110] Single-sex courses, programs and activities *may* be permitted in a few limited instances if they can be justified for affirmative action purposes. However, indi-

cations are that this exception will be construed very narrowly. It is not clear to what extent and in what circumstances special programs or internships for women only will be permitted.

[111] See Subpart D, Section 86.33 of the proposed regulations.

[112] See Subpart A, Section 86.14 and Subpart D, Section 86.34 of the proposed regulations.

[113] For documentation of the degree of sex segregation in vocational schools and programs see Nancy Frazier and Myra Sadker, *Sexism in School and Society*, Harper & Row, New York, 1973; *A Look at Women in Education: Issues and Answers for HEW—Report of the Commissioner's Task Force on the Impact of OE Programs on Women*, Office of Education, Department of Health, Education and Welfare, Washington, D.C., 1972, at 5; Gail Byran, *Discrimination on the Basis of Sex in Occupational Education in the Boston Public Schools*, Boston Commission to Improve the Status of Women, 1973, at 6; Marcia Federbush, *Let Them Aspire!*, Committee to Eliminate Sexual Discrimination in the Public Schools, Ann Arbor, 3rd ed., 1973, at 16-17; and Paula Latimer, *Survey of Sex Discrimination in the Waco Independent School District*, Waco, Texas, 1973.

[114] See Subpart D, Section 86.31 of the proposed regulations.

[115] For a listing of about 4,000 women's studies courses and instructors, see Feminist Press, *Who's Who and Where in Women's Studies*, Old Westbury, New York, 1974.

[116] See Subpart D, Section 86.34(a) of the proposed regulations.

[117] See Subpart A, Section 86.3 of the proposed regulations.

[118] See Subpart D, Section 86.31 of the proposed regulations.

[119] For a listing of approximately 500 women's centers see Association of American Colleges, Project on the Status and Education of Women, *Women's Centers: Where Are They?* Washington, D.C., June 1974.

[120] See Subpart D, Section 86.31 of the proposed regulations.

[121] For a listing of such programs, see the publication by the Women's Bureau, U.S. Department of Labor, *Continuing Education Programs and Services for Women*, Washington, D.C., 1971.

[122] See Subpart D, Section 86.31 of the proposed regulations.

MAY 23, 1975.

Hon. VIRGINIA SMITH,
House of Representatives, Washington, D.C.

DEAR MRS. SMITH: On January 31 Richard Mosse (Assistant Minority Council of the House Committee on Education and Labor) sent a memo to "Interested Persons" which questioned the legal basis for the scope of coverage under Title IX of the Education Amendments of 1972. Title IX, as you know, forbids sex discrimination in federally assisted education programs and activities, so that the definition of "program" and "activity" is critical in determining the extent of coverage by the statute.

Our Association's Project on the Status and Education of Women has also researched this issue, and has come to a very different conclusion from that reached by Mr. Mosse. Enclosed is a copy of a paper our Project has prepared on this issue. This paper analyzes the reasons why the definition of a "program" or "activity" cannot properly be limited only to the precise programs being federally funded, but must also include those programs that are "infected" with discrimination in other areas of the school's program. Were the narrow interpretation proposed by Mr. Mosse accepted, it would be possible, for example, for a school to receive federal monies for a mathematics and reading program which would have to be operated on a non-discriminatory basis. However, if the same school did not receive any federal money for its art or history programs, it could, in Mr. Mosse's view, legally *exclude all females* from such programs—an outcome which would clearly contradict both the intent and letter of the law.

Shortly before the Mosse memorandum was issued, the American Civil Liberties Union examined the issue of the scope of Title IX and also concluded that "program" could not be construed narrowly. (See "Sex Discrimination in Athletics and Physical Education," Women's Rights Project, American Civil Liberties Union, January 1975.)

Similarly, the Congressional Research Service of The Library of Congress studied the same issue and reached the same conclusion: the scope of Title IX must be interpreted broadly.

We hope that you will reconsider the position stated by the Mosse memo, since it would clearly limit the impact of Title IX and be contrary to its purpose as outlined in the legislative history.

Sincerely,

JOEL READ,
President, Alverno College,
SAMUEL F. BABBITT,
President, Kirkland College.
LOIS B. MORELAND,
Spellman College.
GERALDINE RICKMAN,
University of Cincinnati.
SHEILA TOBIAS,
Wesleyan University.
ANNE TRUAX,
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ROBERT J. WERT,
President, Mills College.
ESTHER WESTERVELT,
Associated Colleges of the Mid-Hudson Area.

Enclosure.

AMERICAN CIVIL LIBERTIES UNION, WOMEN'S RIGHTS PROJECT: "SEX DISCRIMINATION IN ATHLETICS AND PHYSICAL EDUCATION", JANUARY 1975

IV. WHAT CONSTITUTES "FEDERAL FINANCIAL ASSISTANCE?"

Federal financial assistance includes grant or loan funds for capital improvements; student scholarship or loan programs; grant of Federal real or personal property; provision of services of Federal personnel; sale or lease of Federal property at nominal or reduced consideration; or any other contract or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty. Proposed Regulations, § 86.2(g).

Few college-level institutions, if any, do not enjoy Federal financial assistance in one or more of these forms; potentially, therefore, each (except those specifically excluded) should be affected by Title IX.

V. WHAT CONSTITUTES A "PROGRAM"?

Title IX specifies that termination or refusal of funds for noncompliance (following investigation and attempts to secure compliance) "shall be limited to the particular political entity, or part thereof, or other recipient as to whom a finding [of noncompliance] has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found. 20 U.S.C.A. § 1682."

The term "program" is not defined in the statute or in the proposed regulations. Clearly, the interpretation is critical to the definition of Title IX jurisdiction. A narrow construction would bring under the Title IX regulations only those departments or activities which are themselves direct recipients of federal monies. Other departments within the same institutions would remain free to discriminate without the potential of government fund cut-off. This interpretation would severely restrict the impact of the Title IX mandate.

On the other hand, the broadest construction might consider an entire institution to be the "program" in noncompliance. In that context, HEW would have the power to terminate all assistance to the institution based on a finding that one segment was discriminating. Such an extreme sanction could be abused.

Either of these interpretations would run counter to the congressional purpose. Neither is supported by case law, legislative history, or the Office of General Counsel at HEW. Those sources all stress the importance of a broad attack on discriminatory practices, but recognize the problems of proof, injury to nondiscriminatory programs and individuals, and possible over-zealous fund termination.

There is as yet no case law under Title IX interpreting the term "program", but identical language in Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d(1), has been interpreted in *Board of Public Instruction of Taylor County* v. *Finch*, 414 F. 2d 1068 (5th Cir. 1969). In that case, HEW had terminated all federal funding to a county school board on account of race discrimination although some of the board's federally assisted programs had not been found to discriminate. The Fifth Circuit vacated the termination order, holding that Title VI did not intend wholesale cutoffs but required case-by-case examination of particular activities which are actually discriminatory.

A close look at the facts and reasoning of *Taylor* discredits the argument that the decision supports a narrow construction of the termination power under Title IX.

Taylor County was charged with racial segregation of its elementary and secondary schools, which received money under the Elementary and Secondary Act of 1965. The district's supplementary educational centers and adult education classes, recipients under independent federal grant statutes, were neither investigated nor found in fact to be discriminatory. These latter programs were quite separate and distinct from the programs found to be constitutionally defective. By refusing to permit, without adequate proof, across-the-board fund termination, the Court hoped to protect "innocent beneficiaries of programs *not* tainted by discriminatory practices." *Taylor*, at 1075.

Parts of the decision construe "program" to mean an activity financed under an individual grant statute, again, a narrow definition. But other language leaves open to proof the possibility of a broader interpretation.

"[T]he administrative agency seeking to cut off federal funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory. 414 F. 2d at 1079."

Thus, even if funds provided by a particular grant are not administered in a discriminatory manner, "if they support a program which is infected by a discriminatory environment, then termination of such funds is proper." 1078. Although "from time to time . . . a particular program . . . is effectively insulated from otherwise unlawful activities," there are other circumstances where, with proper proof, the sanctions provided under Title VI (or, presumably, Title IX) could be used to prevent discrimination in activities which are not themselves receiving federal funds

In the context of a university, programs and activities are likely to be more tightly interconnected than those differentiated in *Taylor*. Arguably, discrimination in any part of a university "infects" the whose environment and should subject the whole institution to federal rules and sanctions, regardless of whether the specific program in question is discriminating with the assistance of federal funds. Certainly the administrative structures, budget mechanisms, and admissions office pronouncements of most universities attest to the community nature of each institution. Discrimination in any quarter of such a community would affect the whole.

Specifically, if a university's library restricted entrance to whites, or to males, that would clearly establish in environment of discrimination throughout the institution. In that event, whether the library itself received federal money should be immaterial. The entire institution would be in noncompliance with the law, because the educational experience of all students would be "infected" by the discriminatory practices of an integral program thereof.

Ms. Buek, an attorney in the office of General Counsel at HEW in Washington has said that HEW expects to proceed under Title IX with a broad interpretation permitting far-reaching jurisdiction. The statutory intention to reach all forms of discrimination within educational institutions simply could not be served, she suggests, by any other construction. And athletics in most institutions is demonstrably of sufficient importance to "infect" the entire institution with any discrimination. If proof is presented of that pattern, there would likely be no problem in subjecting athletics departments to either the regulations or the sanctions of Title IX.

Legislative history on the meaning of the term "program" in Title IX is nonexistent, but the purposes of the statute itself are instructive.

Congress intended the fund termination mechanism of Title VI for therapeutic rather than punitive application, in order to make sure that funds of the United States "are not used to support racial discrimination." 110 Cong. Rec. 7062 (1964). Procedural limitations were designed to insure that termination would be "pinpointed . . . to the situation where the discriminatory practices prevail." 1964 U.S. Code Cong. & Amd. News 2512.

Legislative efforts to narrow the reach of the fund cutoff power resulted in part from the breadth of Title VI, which encompasses *all* programs receiving Federal assistance. Fears were expressed, for example, that school discrimination would lead to termination of aid to roads and highways, or that Title VI would punish entire states, particularly in the South, for any act of discrimination committed within them. 110 Cong. Rec. 7059 (1964).

The *Taylor* decision affirms the importance of "programmatic specificity" in the context of such fears. Assurances that the termination power could only be exercised against the particular activity found to discriminate must be seen as response to misperceptions of Title VI. They were not intended to emasculate anti-discrimination provisions.

House of Representatives,
State of Utah
Salt Lake City, May 19, 1975.

To district and city superintendents of Utah schools:

As legislators interested in the professional advancement of qualified individuals throughout our society, we find the facts concerning women educators in Utah, in a recent article by Afton Forsgren in UEA ACTION, to be alarming to say the least.

According to the data in this article, taken from the 1974–75 *Utah Public School Directory*:

"Of the 40 school superintendents, all are men.

"Of the 26 individuals listed as assistant superintendents, only one is a woman.

"Of the 368 elementary school principals, 17 are women—12 of whom are assigned to one or two-teacher schools, generally located in remote areas of the district.

"Of the 88 junior high school principals, not one is a woman.

"Of the 42 junior high school assistant principals, three are women.

"Of the 89 senior high school or six-year high school principals, not one is a woman.

"Of the 73 senior high assistant principals, not one is a woman.

"Using the same source for data, women fare no better in the State Department of Public Instruction:

"Of the 17 individuals classified as administrators, including the state superintendent and assistant superintendents, only one is a woman.

"Of the 32 classified as coordinators, only two are women.

"By way of summary, Table 33, page 40 of the publication-*Status of Teacher Personnel in Utah*-1973–74 of the total Utah administrators, supervisors and principals, 837, or 93.7%, are women. Yet Table 34, page 41 of the same publication indicates that women make up 53.6% of the total professional staff of the 40 school districts."

If the "school" is to be an example, it must examine its own employment practices to determine whether women employed by the school are being discriminated against by its own personnel policies.

With few exceptions, schools are now subject to at least two federal equal employment laws: Title VII of the 1964 Civil Rights Act, which is enforced by the Equal Employment Opportunity Commission, prohibits virtually all sex-based employment discrimination.

The Equal Pay Act, enforced by the Wage and Hour Division of the Labor Department, requires that equal salaries be paid to men and women who perform substantially equal work requiring similar skill, effort and responsibility, and performed under similar working conditions. In addition, institutions which receive federal funds are required to follow Title IX nondiscrimination policies which are enforced by HEW. In most respects, Title IX employment regulations will follow Title VII interpretations and guidelines.

It is obvious that women's issues will be under consideration by the school administrators for many months ahead. We can foresee that there will be heavy pressure to alter these alarming facts.

We hope that your office and Board of Education are addressing themselves to these problems.

Very truly yours,

Representative Ver Carlisle,
Fourth District.
Representative Beth S. Jarman,
55th District.
Representative Beverly J. White,
Sixth District.
Representative Pelicca A. Holder,
53rd District.
Representative Genevieve Atwood,
First District
Representative Mary Larraine Johnson,
Ninth District.

LOGAN CITY SCHOOLS,
Logan Utah, May 30, 1975.

Representative VEE CARLISLE,
Salt Lake City, Utah

DEAR REPRESENTATIVE CARLISLE: I read with interest your directive to district and city superintendents of Utah regarding the professional advancement of qualified individuals throughout our society.

I personally believe I don't have any hang-up with women educators, but in the 25 years I have been in the business, I have been asociated with women administrators and I can assure you that not in one single situation was the operation a happy one. In the first place, for some reason, women do not like to work for other women and I have learned through the life of hard knocks that most men do not appreciate working for women either.

Unless I am directed differently, I will not be appointing women administrators in the Logan School System. I do have a very charming lady who assists me with my elementary program, as a consultant in elementary education, who does her job well and is paid well for what she does. I also have a woman who manages my lunch program.

I do not know what your experience has been in the field of employment—whether you have worked for men or women. I can only tell you what my experience has been and I know that productivity in the school business is much better when males run the operation than when women do.

Sincerely,

JAMES C. BLAIR,
Superintendent.

SEX DISCRIMINATION

NEW HEW REGULATIONS ON SCHOOL SPORTS LAUDED

"The long-awaited federal guidelines against sex discrimination in the nation's schools and colleges will have their greatest effect on sports. Most of the stereotyping that barred girls from taking shop courses and boys from learning to cook and sew will have vanished by now in all but the most backward schools. But gym classes and team sports are another matter.

"A revolution of sorts is implicit in the new rules laid down by the Department of Health, Education and Welfare. In any school receiving federal aid—and that means some 16,000 public school systems and 2,700 colleges and universities—females must be granted equal opportunities in physical education as well as in all other areas of learning.

"This does not mean boys and girls showering together, or roughing each other up on the football field. Separate but equal is the rule when it comes to facilities and contact sports. But it does mean coed physical education classes in the lower schools, increased funding for women's sports teams wherever there is a demand for them, and mixed teams of men and women in noncontact sports where there is insufficient demands for separate—and equal—women's teams.

"All this is flying in the face of very long tradition, and will take some getting used to. But the evidence of gross discrimination against women in sports demanded some action by HEW, and the guidelines strike a sensible course in allowing for biological differences yet insisting on equal opportunities.

". . . It will no longer be possible to lavish money on a football team while forcing the women to hold a bake sale to support their winning tennis team. The discrepancies were illustrated by a report last year showing that only 5 percent of the $6 billion budgeted for intercollegiate sports went to women in the 10 state-supported universities in Illinois. A considerable reordering of priorities is due.

"But that isn't necessarily bad for sport. The overemphasis and the growing professionalism of college sports (men's sports, that is), has been a scandal for years. Giving female athletes a fair deal may indeed shake up the system, but it's a shakeup that is overdue.

"The time, fortunately, is passing when it is possible to make remarks like 'she throws like a girl,' or 'she thinks like a man,' without anyone pointing out the basic ridiculousness of those assessments.

"Girl children in America are increasingly able to grow up without being signalled that, as a group, they don't have what it takes—and that if they do, it is because they have somehow managed to leave their femininity behind and have taken the giant leap to clear-headedness and co-ordination that boy children were born with.

"That happier and healthier outlook on half our population should get a boost from the new federal regulations that bar discrimination in educational practices, including school athletics.

"College athletic directors, who for the past several years have been reacting with a bad case of the vapors to the very thought of the new rules, will not have to spend equal amounts of money on men and women. They will have to offer equal athletic opportunities to both though, including scholarships.

"What the new regulations basically do is make it possible for school girls and college women to have the same chance as school boys and college men to know the pleasures and pains of sports competition. They are neither the end nor the beginning of school athletics."

"Congress should not delay implementation of the new federal regulations to eliminate discrimination on the basis of sex by schools, colleges and universities.

"Congress took the unusual step of reserving to itself the right to review and disapprove the regulations drawn up by the Department of Health, Education and Welfare. If Congress does not disapprove them within 45 days, the regulations take effect.

"While the regulations, which affect admissions, assignment, hiring and athletics, do not take the absolutist line sought by militant feminists, neither do they adopt the soft line sought especially by the National Collegiate Athletic Association. We believe that the HEW proposal is reasonable and can be effective.

"It is especially important that HEW monitor its regulations closely and that Congress keep an eye on the situation, for it may be that HEW's assumption of good faith on the part of the affected institutions is too optimistic. If that turns out to be the case, action to stiffen the compliance provisions should be taken promptly. In the meantime, however, Congress should allow the regulations to take effect rather than allow existing inequities to continue for another year or more."

[From the Washington Star, June 12, 1975]

FROM THE FATHER OF 5 DAUGHTERS—"DAMN YOUR EYES, JIM KEHOE!"

Two years ago Carl G. Croyder, a Potomac, Md., realtor and father of five daughters who play sports, filed a complaint with the Office of Civil Rights (HEW) charging sex discrimination in athletics at the University of Maryland. He is still at odds with the university, namely the school's athletic director, Jim Kehoe. Here is Croyder's rebuttal to Kehoe's views which were published last week, a piece which Croyder has titled, "Damn Your Eyes! (an old pirate expression) Jim Kehoe."

The English possess a wonderful pomposity. Remember that old saw about how the war was won on the playing fields of Eton?

Well, another kind of war is going on right here in America—the War of Women's Liberation—and it, too, is being won on playing fields. Of course, the more cynical think it is being won through lesbian lifestyles. A great many think it is being won at the abortionist's abattoir. Still more believe it is to be won by adopting the manners and morals of men (sad examples that we are). The truth is this: The war is being won by young girls in sweatsuits and Adidas.

How comes this inspiration? By way of my five athletically inclined daughters, that's how—daughters who are quicker than I am, better coordinated than I am, and (worst of all) who can beat me one-on-one in basketball! Childless people don't really know what's going on. Why, without my daughters I wouldn't be into Women's Lib. And I wouldn't be having all this trouble with Jim Kehoe.

James H. Kehoe, for the unaware, is director of athletics at the University of Maryland. He likes women—in their place, of course. And when it comes to sports, that place is either in the stands or just in front of the stands in tight sweaters and very short skirts. How else does one explain an annual athletic budget of more than $2 million of which only $50,000 is allocated to women's intercollegiate sports?

It was the same Mr. Kehoe who said he wouldn't "dignify" the question with an answer when he was asked last week by a reporter if the women's basketball coach at Maryland, Dorothy McKnight, should be making roughly the same as the men's basketball coach, Lefty Driesell. But then, as an afterthought, Kehoe said, "When the women's basketball team starts drawing 15,000 (persons!) to Cole Field House, I'll be receptive to that."

Based on that remark, I have a question for Mr. Kehoe: Which came first, the chicken or the egg?

In 1972 Congress enacted a law known as the Educational Amendments Act. Title IX of that act reads in part as follows:

"No person in the United States shall be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving federal assistance . . ."

Catherine Ley, president of the American Association for Health, Physical Education and Recreation has said Title IX "does more for women than anything since women got the right to vote."

Now I believed all that. And, since the University of Maryland receives annually more than $20 million in federal funds, in December of 1973 I filed a complaint with the Office for Civil Rights (HEW) charging the university with discriminating against women in intercollegiate athletics. (Then, while I was at it, I filed a similar complaint against the Montgomery County Public Schools.)

Why should the Maryland men be flown to Charlottesville, a short distance away, while the women spend two days driving themselves to Rochester to play in a tournament? Why should the athletic department flunkies be given expense-paid trips to the Orange Bowl while girls who qualify for national competition be denied that opportunity? Why should the men play teams clear across the continent while the women generally are limited to playing the small colleges they can travel to and from in an afternoon? Title IX was the answer to these questions, it seemed.

The mills of the gods grind slowly but they are swifter than Nick Basciano, the Maryland sprinter, compared to the mills of the federal bureaucracy. The upshot is that nearly two years and more than $300,000 later nothing has happened. Whence the $300,000? It was laid out by the National Collegiate Athletic Association—an all-male organization—in a lobbying effort against the implementation of Title IX.

So, Mr. Kehoe continues to expand his athletic empire at the expense of women, annually getting a $30 athletic fee from every woman undergraduate (total—$300,000) and returning to the women's athletic program 10 cents on the dollar (total—$30,000). Yes, damn your eyes, Jim Kehoe! If my daughters were my sons, you and the other male coaches at Maryland would be making fools of yourselves at my home in Potomac, as you did in Petersburg (home of Moses Malone) and elsewhere.

But hold on. I've lost the thread of discourse which was that the War of Women's Liberation is being won on the playing fields of America.

How can women be stereotyped as sex symbols and sex objects when they are as eagerly engaged in competitive sports as are men? Never mind that women's records can never match those of the bigger, stronger men.

It is enough that women achieve excellence within their own dimension. After all, no one expects the Little Leaguer to compete against the big leaguer or the middle-weight champion to enter the ring against the heavy-weight champion.

Amid disquieting forces afoot in the land, the trend toward active participation in sports by women is a profoundly healthy and hopeful one. Play on, sisters, play through!

[Mailgram]

PROJECT ON THE STATUS AND EDUCATION OF WOMEN

President GERALD FORD,
White House,
Washington, D.C.

DEAR MR. PRESIDENT: The association of American colleges has recently learned that section 86.7 (B) of the proposed title IX regulations now awaiting your signature contains a wholly new provision which will require all educational institutions to develop grievance procedures for handling student and employee complaints of sex discriminations. While we are indeed committed to the principle of internal resolution of complaints, we are nevertheless deeply concerned about the intrusion of Federal regulations that would require such procedures, and ultimately would control the form and substance of these procedures. Because this provision was not part of the original proposed regulations, institutions have not had the opportunity to present their views upon this subject to the Department of Health, Education, and Welfare. Any Federal requirement for grievance procedures would indeed violate the time honoured principles of academic freedom and institutional autonomy. Furthermore, there is nothing in the legislative history of the Educational Amendments of 1972 that would mandate such a requirement. In addition, we point out that having different requirements for complaints of sex discrimination from those of minority or national origin discrimination will lead to confusion on the part of those women who file simulataneous charges under sex discrimination and minority discrimination. We thereby strongly urge that, before you sign the regulations, you delete this section that would require grievance procedures.

Sincerely,

Frederic Ness,
President, Association of American Colleges.

Recommendation to President Concerning Proposed Regulations on Title IX of the Education Amendments of 1972 Adopted by the Natural Commission on the Observance of International Women's Year, May 16, 1975

The National Commission on the Observance of International Women's Year has as one of its primary mandates the full and proper enforcement of existing Federal legislation banning discrimination on the basis of sex.

The regulations to implement Title IX of the Education Amendments of 1972 are now awaiting approval by the President. This law is the first banning discrimination on the basis of sex in all education programs and activities receiving Federal financial assistance.

There are four areas of the draft regulations of particular concern to the Commission. As they stand, they do not appear to reflect the intent of the legislative history. Thus the Commission recommends that the President consider the following recommendations:

1. The present version requires resort to internal grievance procedures, which may be unduly prolonged. We recommend allowing complainants the option of using internal grievance procedures, if an institution has them, or filing complaints directly with the Department of Health, Education, and Welfare. The complainant would, of course, have the option of filing with both HEW and using the internal grievance procedures.
2. A new provision is needed which would require the recipient of Federal assistance to conduct and publish self-evaluation to assess its status in regard to existent sex discrimination. This evaluation should cover admission practices, financial aid, educational program access, curriculum, and athletics, as well as employment.
3. We recommend the establishment of a uniform pension policy under the existing Federal legislation now covering employment. The EEOC guidelines, which require equal periodic benefits, would appear to be more equitable, and we would recommend that the Title IX regulations reflect this approach.
4. The section on athletics has been fully weakened. We recommend deletion of the references to contact sports and replacement of the athletic sections with the language of the June proposed draft.

The Commission further urges the President to sign the regulations within the next few weeks so that the school year will begin with the regulations in place.

STATEMENT OF DR. BERNICE SANDLER, DIRECTOR, PROJECT ON THE STATUS AND EDUCATION OF WOMEN, AND EXECUTIVE ASSOCIATE, ASSOCIATION OF AMERICAN COLLEGES, WASHINGTON, D.C.

Ms. Sandler. I am Dr. Bernice Sandler, executive associate at the Association of American Colleges and director of the project on the status and education of women. The Association of American Colleges is composed of approximately 700 member institutions concerned with undergraduate liberal education. The majority of our members are private institutions, many of which are church-related.

I am also chairperson of the Office of Education's Presidentially appointed Advisory Council on Women's Educational programs mandated by the Women's Education Equity Act. I testified before this committee several times, first in 1970 when Representative Edith

Green held hearings on the bill that eventually became title IX of the Education Amendment of 1972. Later I was employed by this committee as an education specialist to compile the printed record of those hearings. As such, I believe I was the first person ever hired by any congressional committee to work specifically in the area of women's rights.

The 92d Congress articulated a clear national policy to prohibit sex discrimination at all levels of education when it enacted title IX of the Education Amendments of 1972 and several other laws.

In March of 1972, title VII of the Civil Rights Act of 1964 was amended to prohibit discrimination in employment in all educational institutions, public or private, whether or not they receive Federal funds. The Equal Pay Act of 1963 was amended to include administrative, professional and executive employees, so that women faculty are covered by that act. Titles VII and VIII of the Public Health Service Act were amended to prohibit discrimination on the basis of sex in admission to training programs for the health professions which receive funds through that act. The equal rights amendment was also passed by the 92d Congress—an amendment that would, among other things, clearly strengthen constitutional protection against sex discrimination in publicly financed education programs.

Thus, the Congress has recognized the serious implications for the Nation of denying equal opportunity in education and employment to women and girls, and has taken numerous steps to implement the national policy to end such discrimination.

Although title IX has been in effect since July 1, 1972, HEW has taken an unprecedented 3 years to write the regulation to finally implement the law. The regulation was signed by the President and sent to the Congress on June 4, 1975. Unless the Congress rejects the regulation, it will go into effect on July 21, 1975. Under a provision of the Education Amendments of 1974, Congress may reject the regulation if it believes that it is inconsistent with the statute.

Thus, my testimony today will focus on the issue of whether or not the regulation is consistent with the legislation. Whether the regulation contains portions that could be written in a better manner, whether the regulation is too strong or too weak, whether one likes or dislikes the regulation, or whether one opposes the basic legislation—these are not appropriate items to take into consideration in deciding whether or not the regulation is consistent with the law.

The main opposition to the regulation stems from its coverage of athletic programs. Two basic questions need to be examined:

(1) Are athletics covered by the title IX mandate for equal opportunity even though they receive no direct Federal funding?

(2) If discrimination in athletic programs is indeed covered, are those parts of the regulation that deal with athletics consistent with the legislation?

I. ARE PROGRAMS AND ACTIVITIES NOT DIRECTLY RECEIVING FEDERAL FUNDS COVERED BY TITLE IX?

I won't read the basic enabling law in title IX. I am sure you heard it many times this week.

The question of what constitutes a program or activity becomes a critical one in interpreting the proper scope of title IX. Does "program or activity" mean only those programs and activities which receive Federal money, or does "program and activity" refer to all the programs and activities of an educational institution receiving Federal funds?

The statute itself provides no direct guidance to the answer to this question. The title IX regulations interprets the prohibition against discrimination to apply to all programs and activities of the institution.

If "program or activity" is interpreted narrowly to mean only those programs or activities directly funded by the Federal Government, an institution would be free to discriminate in all areas of its programs other than those which receive Federal aid.

Such an interpretation would severely restrict the impact of title IX and would be contrary to the legislative history and purpose of the statute. For example, a department of economics would be able to prohibit or limit admission of females to its program while a department of biology down the hall in the same institution which received Federal money would have to be nondiscriminatory in its program.

Similarly, the school could not discriminate in a building that was built with Federal funds, but across the street it could conduct the same activity in a discriminatory manner in a building built prior to the time when Federal funding was available for construction.

Although there are no cases as yet under title IX to aid in the interpretation of "program or activity," the identical language in title VI of the Civil Rights Act of 1964 has been interpreted in *Board of Public Instruction of Taylor County* v. *Finch.*

The court held that title VI did not intend wholesale cutoff of Federal aid; rather it requires a case-by-case determination of those activities which might be discriminatory.

Some persons who disagree with HEW's interpretation of title IX (and title VI) are citing *Taylor* v. *Finch* as justification for limiting coverage only to those activities that receive direct Federal assistance. However, *Taylor* v. *Finch* dealt with the question of whether discrimination in one federally assisted program could automatically result in termination of all Federal funds even though there had been no findings of discrimination in other programs. *Taylor* v. *Finch* focuses on the scope of the remedy for discrimination in terms of which funds should be terminated; it does not deal directly with the question of whether or not discrimination is prohibited in all programs and activities of the institution.

Nevertheless, the court specifically ruled that illegal discrimination in one part of the school system does not automatically "infect the whole"; "each program receives its own 'day in court.'" At the same time, however, the court clearly supported the concept that discrimination in one part of the school system could indeed "infect the whole":

> The administrative agency seeking to cut off funds must make findings of fact indicating either that a particular program is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.

Such discrimination, in a program that did not receive direct Federal funding, could "infect the whole" by causing a chilling effect on applicants to the institution and thereby diminishing the number of persons participating in the federally assisted programs within the institution.

Taylor v. *Finch* specifically allows for the possibility that sanctions could be used to prevent discrimination in activities that are not themselves the direct recipients of Federal aid precisely because federally assisted programs can be thereby "infected by a discriminatory environment." By requiring "separate consideration of the use or intended use of Federal funds," and disallowing wholesale cutoffs by HEW to all programs, the court made clear that its aim was to protect "innocent beneficiaries of programs not tainted by discriminatory practices." There is no language in the decision that in any way condones discriminatory practices in nonfederally assisted activities which affect students in programs aided by the Federal Government.

A second case, *Bob Jones University* v. *Roudebush*, which was upheld on May 28, 1975, by the U.S. Court of Appeals for the Fourth Circuit also supports the principle that discrimination in all programs of the institution are covered. The university, because of its religious beliefs, discriminates against blacks in admissions. It receives no direct Federal funds and is supported by student payments and gifts.

The court concluded that veterans' benefits were indeed Federal assistance under the meaning of title VI and that Bob Jones conducts a program or activity within the meaning of title VI:

> . . . payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools, thereby releasing institutional funds which would, in the absence of Federal assistance, be spent on the student. Analogously, Bob Jones' participation in the HEW-administered National Defense Student Loan Program (NSDL) relieved the university from the burden of committing its assets to loans to eligible students.

The court denied any veterans' benefits from being funneled in any way to an institution which discriminated, even though the institution did not receive direct funding; it did not in any way suggest that only those portions of veterans' benefits which were spent on strictly educational programs be withheld.

The court, in talking about veterans' educational benefits, stated the principle that, whether cash payments are made to a university and thereafter disrtibuted or given to veterans directly "is irrelevant, since the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in any event." The same reasons would apply to student loans and other forms of indirect assistance.

The court also stated that "Bob Jones conducts a program or activity within the meaning of title VI," and that "Bob Jones' educational program receives Federal assistance."

Student loans and revenue-sharing funds, like veterans' educational benefits, are general funds which can be spent by the institution in a variety of ways. If discrimination is prohibited only in those programs or activities which receive direct Federal assistance, institutions would have to account for the exact spending of loans, et cetera, and would be able to divert them from discriminatory activities to program areas that did not discriminate while allowing blatant discrimination to exist elsewhere in the institution. This would obviously subvert the purpose of the act.

It is clear that such general funds, as well as direct programmatic assistance, often enable institutions to support numerous other school activities, such as athletic programs and extracurricular activities.

In the absence of precise statutory language or legislative history, courts look at the aim of the legislation: in this case, to end discrimination. A narrow interpretation of the statute to exclude programs not receiving direct Federal assistance would be inconsistent with the aim of ending discrimination.

Moreover, the legislative history is precise in indicating the intent to cover all areas of a school's activities. Senator Bayh, sponsor of title IX in the Senate, stated on February 28, 1972, on the floor of the Senate that:

> * * * we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment * * * In the area of services, once a student is accepted, we permit no exceptions. (Congressional Record, February 28, 1972, S2753)

Surely the Congress did not intend to initiate a Federal policy of giving Federal assistance to an institution which discriminates in some areas although not in others. To do so would be to extend benefits to male students that could not be extended to female students. An interpretation that title IX only applies to part of a school's activities might well put both the school and the Federal Government in violation of the 14th amendment, to the extent that the Government is a joint participant in the discriminatory activity. The Constitution requires that the Federal Government insure equal opportunity in projects it finances directly or indirectly. Under the due process clause of the fifth amendment, the Federal Government cannot provide direct grants to public or private entities which discriminate on the basis of race. It is likely that the courts would make a similar determination on the basis of sex. It would be both awkward and unusual for title IX to allow what may indeed be constitutionally prohibited.

Except for specific exemptions, the language of title IX is virtually identical to that of title VI of the 1964 Civil Rights Act. Under title VI, the courts have consistently considered sports to be an integral part of the school's program or activity and thereby covered by title VI. If Congress had meant to distinguish between race and sex discrimination in athletics, it would have done so, as it indeed did in the area of admissions, where title IX has exemptions and title VI has none. Certainly the identical language which appears in both title VI and title IX cannot mean one thing when race discrimination is involved and mean something very different when sex discrimination is involved. The standard concerning what constitutes discrimination should not be less for women than it is for minorities.

An analysis of the legislation and case law which was prepared by the Congressional Research Service of the Library of Congress supports the interpretation that discrimination in all programs and activities is prohibited by title IX in those institutions receiving Federal funds.

A similar conclusion was reached by the American Civil Liberties Union and the Center for National Policy Review at the Law School of Catholic University.

II. DID THE CONGRESS INTEND TO COVER ATHLETICS WHEN IT ENACTED TITLE IX?

It is often stated, erroneously, that the Congress did not intend for athletic programs to be covered by title IX. However, the legislative history specifically indicates the intent of the Congress to end discrimination in all phases of education, including sports. Senator Bayh specifically mentioned sports in his statement on February 28, 1972 (Congressional Record, S2747); speaking of instances where differential treatment by sex might be allowed, he said:

> These regulations would allow enforcing agencies to permit differential treatment by sex only—very unusual cases where such treatment is absolutely necessary to the success of the program—such as in classes for pregnant girls or emotionally disturbed students, in sports facilities or other instances where personal privacy must be preserved.

Thus the legislative history reflects the intent of the Congress to prohibit discrimination in sports. Moreover, the Congress did enact several exemptions (such as military schools and a partial exemption for housing). If it had meant to exempt athletics, it would have done so.

The intent of title IX is to provide equality of opportunity and equal access to instruction, facilities and all other aspects of all programs conducted by educational institutions receiving Federal moneys.

Congress did not—nor could it have been expected to—specifically detail every single area of coverage. It did, however, enact several exemptions, and athletics is not one of these. The enactment of these exemptions explicitly means that all areas not exempted are thereby covered by the statute.

This interpretation of title IX and its coverage of athletics is further confirmed by the Javits amendment, section 844 of the Education Amendments of 1974, which ordered HEW to prepare regulations implementing title IX.

> * * * which shall include with respect to intercollegiate athletic activities reasonable provision considering the nature of particular sports.

The language of this section is more than clear: It confirms the intent of the Congress that title IX does indeed cover sports.

III. ASSUMING THAT COVERAGE OF ATHLETICS IS MANDATED BY TITLE IX, IS THE REGULATION CONSISTENT WITH THE LEGISLATION IN THE MANNER IN WHICH IT COVERS ATHLETICS?

Perhaps the most controversial area that title IX covers is that of athletics. Here the discrimination against females is perhaps the greatest, certainly in terms of the differences in the amount of money spent on each sex and in terms of clearly overt discriminatory policies and practices. No other issue under title IX has generated as much heated debate and controversy as equality in sports and athletics.

Apart from the pressures of the organized male athletic hierarchy, the athletics issue is one of the most difficult to deal with. More than most areas of our educational system, athletics and physical education reflect the essence of our most stereotyped cultural expectations: men are "supposed" to be strong and aggressive; women are "supposed" to be weak and passive. Girls and women have generally not been encouraged to participate in physical activities because the traits associated with athletic excellence, such as achievement, helf-confidence, leadership, and strength, are often seen as being in contradiction with the expected role that females are "supposed" to play.

Another difficulty in dealing with the sports issue is that the legal precedents are far from clear. In almost all other areas of discrimination, the precedents and principles developed by the courts in race discrimination cases can readily and easily be applied to sex discrimination problems.

Because of the general physical differences between men and women as a whole, the principles developed in other discrimination areas do not easily fit athletic issues, particularly in the area of competitive sports, where the issue of single sex teams and integrated teams is a difficult one to solve. "Separate but equal," which is a discredited legal principle in terms of civil rights, may have some validity when applied to some areas of competitive athletics, but it is by no means clear how and in what circumstances involving competitive athletics this principle should be applied.

The legal principles are only now beginning to be articulated in the courts as this is a relatively new area of litigation. It simply cannot be said with any certainty that "equality of opportunity" would best be attained by one procedure rather than by another.

Our project's paper. "What Constitutes Equality for Women in Sports?" which is attached to my prepared statement, deals with some of the methods suggested by various groups as means to achieve equality.

In general, the title IX regulation is weaker than current case law would mandate. However, no matter what position the HEW regulation adopts on sports, it is almost inevitable that the courts will mandate changes in the next few years as they shape the standards for equality in this area.

It is also equally certain that there is no way that HEW could have drafted regulations for athletics that would be acceptable in large measure to most of the interested parties. We need time to experiment, to test out various approaches and to let the courts shape the doctrine of equality in sports.

IV. DOES TITLE IX MANDATE AN EXEMPTION OF INTERCOLLEGIATE ATHLETICS AND/OR REVENUE-PRODUCING SPORTS?

The regualtion makes no distinction between sports which produce revenue and those which do not. Opponents of this athletic coverage in the regulation claim that the Congress did not mean to cover intercollegiate athletics and/or revenue-producing sports.

However, there is nothing whatsoever in the statute or the legislative history to mandate or allow the exemption of either intercollegiate athletics or revenue-producing sports. Indeed, the Congress explicitly rejected this approach when it defeated the Tower amendment to the Education Amendments of 1974 which would have specifically exempted revenue-producing sports. If the Congress had meant to exclude revenue-producing sports, it did not do so when it passed title IX. When it had a second chance to do so, it refused by rejecting the Tower amendment.

Were intercollegiate athletics and/or revenue-producing sports to be exempted, the following inequities could occur (all of the examples below are from actual institutions; the names have been omitted because these institutions are no worse than any others—the problem is widespread throughout academia):

1. Any institution could fall under the exemption by merely charging a nominal fee at all intercollegiate events, even those that were traditionally free. Students, male and female, could be forced to subsidize all male intercollegiate sports by having the fee for admission incorporated into a compulsory "activities fee."

At one institution, student activity fees "automatically" buy admission to men's intercollegiate events. The money is treated as "revenue" for those sports.

Of $68,000 raised by student fees for athletics, only $5,000 was allocated for women's athletic programs, even though the student body was approximately half female.

2. An institution could have a substantial intercollegiate program for males and none whatsoever for females. It could claim that financial exigency prevented the development of woman's intercollegiate programs.

One midwestern university spent over $2.6 million on its men's intercollegiate athletics.

In on State university, the men's athletic program is funded as a line item in the regular budget; the women's program competes with the chess club and other extracurricular activities for a small share of the student activities fee.

A western university has long-range obligations of $4,277,475 for capital improvements: obligations for the football field, track, and a combination dormitory and golf facility total more than $600,000. Despite losses over the past 3 years of $62,000, $92,000, and $22,000, budget adjustments were made in order to provide a total of $1,500 for women's athletics for the current semester.

At another institution, women's sports received only $18,000, or nine-tenths of 1 percent of the institution's $2 million budget, even though over 40 percent of the student undergraduates were female.

3. All facilities used for revenue-producing sports could be restricted to males, or given low priority to female usage. Female teams could be allowed to use the facilities only when the men's teams were not using them.

The women's varsity basketball team at one New England college could practice in the gym only when the men did not want to use it.

At many institutions, women's teams must practice at odd hours, such as after dinner on weekends or before breakfast on weekends.

4. A donor could give money for a new gymnasium or swimming pool earmarked for male intercollegiate activities and practice. Women could be prohibited from access to these facilities, or given limited access, even if there were no other facilities available for women. (See examples under No. 3 above.)

5. All intercollegiate athletic scholarships could be limited to men only, with none whatsoever allocated to women.

Until the spring of 1973, under the rules of the Association for Intercollegiate Athletics for Women (AIAW), females participating in intercollegiate sports were prohibited from accepting scholarships. Very few colleges and universities have scholarships for women athletes. Thus, although there are scholarships for males participating in swimming, basketball, et cetera, women participating in the identical intercollegiate sports have no such aid available to them.

Institutions could legally attempt to attract donors for male scholarships only, without any effort to attract money for women's scholarships whatsoever.

6. Equipment, such as practice uniforms, tennis racquets, et cetera, could be provided for men's teams but not for women's teams.

Women's teams often have inferior equipment or the left-over equipment no longer needed by men's teams when new equipment is purchased.

Typically, when a new gymnasium is built, the old one is retired to the women.

7. Team doctors could be available for male athletes but not for women athletes who would have to pay for their own medical care if injured.

At some institutions the health service provides team doctors for male varsity athletes but not for women athletes.

At one institution a woman athlete who injured her knee could not use the ultrasonic therapy machine available for injured male athletes.

8. Men athletes could have special dormitories, special high protein diets; women athletes could receive no such special attention.

9. Male athletes could be covered by special insurance programs, but not women athletes.

Many institutions provide special insurance programs for their male athletes but not for women athletes.

10. Travel for men's teams could continue to be subsidized at a high level (chartered buses and airplanes) while women's teams travel at their own expense.

At one institution, women's teams sold apples during football games to pay for their travel and other expenditures.

At another institution, women sold Christmas trees to raise money for their expenses.

At some institutions, women's teams sell cookies and cakes to pay for travel expenses, while the men's teams travel in chartered buses or in first-class service in airplanes.

11. Meals and lodging for male athletes while traveling to games could continue to be subsidized while women athletes have to pay for their meals and lodging out of their own pockets.

Many women's teams have no money allocated for per diem expenses while away at games. Often the women bring their own sandwiches and sleeping bags.

12. Budgets to recruit athletes could be limited to male athletes only. Few, if any, women's teams have funds for recruiting women athletes.

13. Budgets for publicity could be allocated totally for male intercollegiate activities, with none allocated for women's intercollegiate athletics.

Many institutions have a budget for public relations for men's athletics. Women's athletics receive little attention in the press as a result.

14. Women reporters could be excluded from the press box during male intercollegiate events. Because these women do not work for the university or college, employment discrimination laws would not apply.

15. All employees who worked in activities or facilities involving intercollegiate athletics—coaches as well as maintenance people—would be exempt from the protection of title IX, which covers employees as well as sudents. Although other employment laws would apply, these particular employees would be denied remediation under title IX, a remedy which is available for all other educational employees.

Some persons are claiming that the title IX regulation will control the use of donated funds, use of generated income, the kind of program to be conducted, and the allocation and qualifications for scholarship assistance in athletic programs. This argument distorts the impact of the regulation: Institutions may indeed conduct any kind of program they wish. The only restriction is that they not discriminate on the basis of sex in the type of program they choose to conduct. The Government does not in any way mandate the type of program an institution would have to have; it only mandates that the opportunities that exist for one sex be available to the other sex as well. These programs do not have to be strictly equal; obviously there may be different interest levels for each sex.

An exemption for revenue-producing sports would essentially say that discrimination against girls and women is legal and justifiable when it is profitable, and that discrimination is prohibited only where money is not involved.

V. Did the Congress intend title IX to mandate coeducational physical education classes?

The regulation requires integrated physical education classes, but allows separation of the sexes during activities involving contact sports. Additionally, if a school has classes dealing with human sexuality, it may conduct separate sections for each sex.

Persons opposed to the title IX regulation claim that the statute was not intended to cover coed physical education classes. They claim that there is no justification for this in either the statute or the legislative history.

As noted earlier, the legislative history does mention sports facilities. Moreover, the coverage of physical education classes should come as no surprise to anyone who read the hearings held before this committee by Representative Edith Green in 1970. The bill before the committee at that time was almost identical to what eventually became title IX—although it amended title VI directly—and did not contain any exemptions at that time. Approximately 5,000 copies of those hearings were printed. Two copies went to each Member of the House and one copy was sent to every Senator.

At least three witnesses during those hearings pointed out to the committee that the bill (then section 805 of H.R. 16098) would have an impact on this area.

Jeris Leonard, then Assistant Attorney General, Civil Rights Division of the Department of Justice, testified on July 31, 1970, asking for an amendment which would allow sex a bona fide basis for different treatment. He noted that such an exemption would permit, among other things, separate dormitories and separate gymnasiums. The Congress did indeed enact a separate provision allowing for separate housing; it did not enact any provision for separate gymnasiums.

Similarly, on July 1, 1970, the Honorable Frankie M. Freeman, Commissioner on the U.S. Commission on Civil Rights, noted that, among other things, the bill would require that "as a condition for Federal aid, all housing owned and operated by an institution, including the use of such facilities as gymnasiums and lounges, be available to persons of both sexes."

Dr. Peter Muirhead, Deputy Assistant Secretary and Associate Commissioner for Higher Education, Office of Education, HEW, testified on July 1, 1970, that the amendment would cover "programs which might be limited to one sex, such as recreational and physical educational activities."

Thus, this committee had every opportunity to amend the proposed bill to exclude athletics and physical education. That it chose not to do so is accurately reflected by a lack of exemption in the title IX statute and in the subsequent regulation.

The question of coverage of physical education classes is now before the Congress in the form of the Casey amendment, which in effect forbids HEW from requiring schools to have integrated physical education classes. Thus the Congress has an opportunity to vote directly upon this matter.

An exemption for physical education classes would raise serious questions about equity for female students. Schools could designate any part of their athletic program, including extracurricular activities and competitive teams, as credit or noncredit "physical education classes" and thus exclude females from virtually all such activities.

A school could label all intramural, interscholastic, or intercollegiate athletic teams as "physical education classes" limited to males only, and give preference in the use of facilities and equipment to those persons who are enrolled in the "class."

Women majoring in physical education could be denied access to specific courses in the physical education department. If the number of women who wanted a particular class was small in number, the school could claim that it did not provide the instruction because there was not enough interest for a separate class. Thus females could be deprived of entry into all "male" physical education programs. HEW would be powerless to require their admission into such classes.

Any school could thereby exclude females from access to programs and activities by using an alternate excuse, such as lack of money or interest for setting up separate programs for females.

One need only look at any playground, schoolyard, or picnic ground to notice that boys and girls, young men, and women, do indeed play many sports together and that "integrated" physical education classes are not likely to be as disastrous as critics claim. Many schools, as a matter of economics and in anticipation of the title IX regulation, have already integrated their physical education programs with little disruption or difficulty.

The time limits allowed by the regulation—1 year for elementary schools, 3 years for secondary and postsecondary institutions—should also smooth the transition to integrated classes.

VI. ADDITIONAL ISSUES BEING RAISED BY OPPONENTS OF THE REGULATION

As well as the issues discussed above, Senator Jesse Helms (D., N.C.) has raised several other areas in his resolution to reject the title IX regulation, which was introduced in the Senate on June 5, 1975. He notes that the regulation(s) "declare that pregnancy must be treated as a temporary disability such as a broken leg."

The Senator seems unaware of title VII of the Civil Rights Act. The Sex Discrimination Guidelines for that act require that pregnancy be treated as a temporary disability, such as a broken leg. Even if the title IX regulation were rescinded, the title VII guidelines would still apply.

Also, if unwed mothers are excluded from further training and schooling, it is virtually certain that they and their offspring will be condemned to lives of poverty and ignorance, with little alternative to joining the welfare rolls.

Senator Helms also notes that:

> While it was the obvious intent of the statute that it apply to those seeking an educational opportunity, the regulations (sic) cover the employees of educational institutions, whether they be maintenance personnel, administrative staff, or teachers. Again, the regulations are inconsistent with the congressional enactment.

A reading of the legislative history and the conference report indicates that the House version of title IX had a provision exempting employment; the Senate version did not. During the conference, the House receded and the exemption for employees was dropped. Thus the coverage of employees is clearly mandated by the legislative history of the act.

Senator Helms has stated that he opposes the provision requiring nondiscrimination in health insurance policies and benefits. He adds,

> Obviously the draftsmen (sic) of this regulation envision a school providing single students with family planning services and at the taxpayers' expenses, no doubt.

The regulation (section 86.39), however, does not mandate family planning services. What it does mandate is that if the institution provides them, it must provide them to both sexes. If the institution provides full health care, as is provided in some postsecondary institutions, then and only then must it include gynecological services. Thus an institution could not provide urological services for males and cover all other illnesses and disabilities with the exception of "female related disorders."

The Senator notes that:

> The language of the statute is clearly prospective in nature. But the regulation requires affirmative action to remedy the effects of supposed past discrimination.

This, too, he describes as being inconsistent with the statute. Yet the regulation clearly does not require affirmative action to remedy supposed past discrimination. What is required is that the institution conduct a self-study and modify policies which have been discriminatory.

Section 86.3(c) requires a self-evaluation by the institution which requires it to "modify any of these policies and practices which do not or may not meet the requirements of this part" and to "take appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these policies or practices."

Preference is specifically prohibited by the statute; in contrast, appropriate remedial steps might include actions such as additional recruiting materials to encourage women to become engineers or scientists; posters to encourage young women to take vocational courses; notification to students of both sexes as well as personnel to inform them of changes in policy; and the development of new procedures to insure that no student, male or female, is denied the opportunity to participate in the school's program because of their particular sex. No numerical goals are required.

VII. COVERAGE OF HONORARY SOCIETIES

The title IX regulation does not allow single-sex honorary societies to exist on a campus when they receive significant assistance from the recipient (86.31(b)(7)). Some persons are claiming that title IX should not cover the membership practices of these societies and that such coverage was not intended by the act.

Many professional groups have single sex honorary societies which often have student members. For example, the international business fraternity, Delta Sigma Pi, limits its membership to males only and has chapters at practically every institution which has a school of business or economics or gives courses in these areas. They also maintain alumni clubs. The organization states that it offers "programs of professional and social activities designed to benefit all business and economics majors." Women students cannot partake in these activities.

Such organizations serve a crucial role in helping new and prospective professionals learn the ropes of their profession; essentially these organizations strengthen the old boy network whereby jobs are referred to friends, news of the profession is disseminated, et cetera.

To a large extent, women have been excluded from this informal network perpetuated by single-sex honorary societies. Where there are two such organizations, one for women and one for men, the men's organization is far more prestigious and usually larger—there are far fewer chapters of the women's groups.

Where professional honoraries exist for the betterment of women, such as an honorary for prospective women scientists, the organization could continue its purpose although it might have to open its membership to men under title IX. Many women's groups which are devoted to women's rights, such as NOW and WEAL, nevertheless have male members. In practice the number of men who join such organizations are few in number; those men who do join are usually very sympathetic to the purpose of the organization.

If honorary societies are exempted from coverage by title IX—as proposed by the Casey amendment—males will also be deprived.

For example, male nursing students will continue to be deprived of the opportunity to join the honorary nursing society.

Honorary societies are not social groups; their criteria for admission should not be based on sex—as would be allowed by the Casey amendment or by exemption from title IX.

Note that the statute in no way prohibits any private organization from doing anything it wants, off-campus. The organization is prohibited from discrimination only when there is significant assistance provided by the recipient of Federal funds (86.31(b)). This interpretation is in line with cases under the 14th and 5th amendments of the Constitution.

SUMMARY

The title IX regulation does not control institutions. It does not tell them what to do or how to do it. It simply says that whatever an institution does, it must not discriminate on the basis of sex.

The Federal Government does not, for example, require an institution to abolish parietal rules or to enact parietal rules. That decision is rightly the prerogative of an educational institution. What title IX does mandate is that, if parietal rules exist, they must apply to both sexes equally. If an institution has no parietal rules then that, too, applies to both sexes equally.

In general, the challenges to the regulation are often based on misconceptions of what the regulation actually says and what the law mandates as well as a lack or knowledge of the legislative history and relevant court cases. Some persons who oppose the regulation actually are opposed to the act itself and are unable to distinguish between the two.

Women's groups and educational institutions have waited 3 long years for this regulation. Educational institutions need guidance from the Federal Government in order to comply with the congressional mandate for equal educational opportunity. Sending it back to HEW for further drafting will only delay the implementation of title IX and will deny to women and girls the educational opportunities that are the birthright of their brothers.

Thank you.

Mr. O'Hara. You would suggest that separate but equal may have some validity in competitive athletics. You apparently don't feel it has validity at all in physical education?

Ms. Sandler. The regulation allows some separate but equal.

Mr. O'Hara. How about physical education?

Ms. Sandler. In physical education and in contact sports participation within those sports in physical education classes would be allowed. You could separate them there.

Mr. O'Hara. Do you feel that an institution could comply with requirements with respect to sex by abolishing its girls' athletic teams and making the girls eligible for all sports?

Ms. Sandler. I would think not. You mean full integration of all athletics?

Mr. O'Hara. Yes.

Ms. Sandler. I would look to the Supreme Court for guidance in a case that was not education or with students but was an employment case, *Griggs* v. *Duke Power Company*. Mr. Justice Burger wrote the opinion for this unanimous decision: A policy which is essentially fair on its face but has a disproportionate effect on a protected class is indeed discrimination unless it can be justified by business necessity.

Mr. O'HARA. In other words, you would feel that failure to provide separate but equal might be a violation of the law?

Ms. SANDLER. Where it would have a disproportionate effect on one sex or the other. For example, in the remote chance that some 25 girls or young women said, "We want to play football," it is clear that having an integrated team then might provide real difficulties. Failure to do so—provided there were such remarkable interests in playing it—might indeed, I think, violate the regulation. It would have a disproportionate effect.

I think this is what is so difficult in the sports area: What has a disproportionate effect? What is real equity and what is equality of opportunities? Those are difficult questions which the court has just begun to wrestle with.

Mr. O'HARA. Do you agree with me that Congress was remiss in not spelling out its intention more clearly on the statute as related to athletics?

Ms. SANDLER. I am not sure the Congress at that point could have articulated more specifically than it did. It is clear that the Congress often enacts general legislation and puts in specific things at times. However, I think it would be very difficult to have put in all kinds of specific details, partly because this is a relatively new area.

I am not sure that the Congress could give us that much more guidance even now. I think this is a very technically difficult area which the courts are beginning to look at and to shape that doctrine of that equity, and indeed a doctrine that needs to be looked at in view of the constitutional provision as well as the statute.

Mr. O'HARA. So you feel that Congress and judges are inherently general?

Ms. SANDLER. Not always. It depends on the judge and it depends on the Congress. But certainly I think when constitutional issues are involved it is something we would want to go through our judicial system because it is difficult to specify every detail and every area in a code.

Mr. O'HARA. Mr. Eshleman.

Mr. ESHLEMAN. Doctor, I think you and I agree that the Federal Court uses the intent of Congress in a lot of instances to determine the meaning of law. Maybe you won't agree with the following statement. I think HEW should also consider the intent of Congress because, as you said, we were general and not specific, and you just answered the Chairman that maybe we couldn't get more specific in sports.

You quoted quite a few Senators. I would like to quote Ms. Green, who was the author of title IX. None of the Senators were, but Ms. Green was the author of title IX. And on November 26 of last year in debate on this, she stated on the floor:

> When funds for athletic departments come out of tuition fees, or tax dollars, women students are to have equal opportunity with men. This does not mean, however, that football teams or basketball teams or any other physical education class shall be forced by the Federal Government to have both men and women on the same team. But intercollegiate sports financed by gate receipts is an entirely different matter and was not covered by title IX.

Now certainly when that is spoken by the author of the title and is in the Congressional Record and was said on the floor of the House, then that must become part of the intent of Congress.

Ms. Sandler. I would think that the courts look to legislative history developed before enactment of legislation rather than that which comes up later. Again, I would point to the legislative history which does mention sports, sports facilities, athletics, several times and to the testimony that was conducted before this committee.

Mr. Eshleman. We all know we have interested alumni, in all 50 States, and the money they donate is their money, the same as if you wanted to give $100 to the Red Cross and $500 to the United Fund, I still think that is your privilege in this country, to differentiate that way.

What would happen to an alumni's contribution, say, of $10,000 to the football team because he is "gung ho" over the football team, what would happen to that money?

I don't have any idea, I am asking you, what would happen to the money under title IX regulations? Could that go explicitly for that football team?

Ms. Sandler. I am not fully sure on this, the athletic regulations.

Mr. Eshleman. I am not trying to trap you because I don't know. But it seems to me if it can't, then I think maybe HEW went a little too far because the next thing we will do is say you give equally to the United Fund and the Red Cross and you can't distinguish on that.

Ms. Sandler. Yes, I am not sure, I don't see where it would be illegal. There is obviously in almost every football team not enough money to pay for current expenses, so it might well be. But I am really not sure.

Mr. Eshleman. I was hoping it would be as simple as this, that the bookkeeping, separate bookkeeping, and have that as a separate bank account, financial account, and be able to show at any time at any audit how it was spent. I would hope it was as simple as that and I hope we don't destroy alumni interests in college sports.

Ms. Sandler. There is no question that the sports regulations are not as clear as one would like them to be. I cannot speak here for HEW and it is rare that I go ahead and speak so favorably of them, but I would hope that their intent may have been to give us some lead time to try to figure out what the right thing is to do.

We really don't know. On this question I am not sure what the answer is. I would point out, even though schools that make a profit on their football team are heavily subsidized in that the cost of the stadium does not usually appear necessarily in the athletic budget and that each institution keeps its own budget in ways that are unique to that institution, so all we know is that the way things currently stand most institutions do lose money on these things.

Mr. Eshleman. That is all, Mr. Chairman.

Mr. O'Hara. Mr. Blouin.

Mr. Blouin. I was just going to say in that regard I would think it would have to be case by case decision. Some institutions, as you mentioned, would not be fortunate, I think the NCAA went to a $50 million loss this past year and it is obviously not a profitable venture, so it won't take much to distribute the loss and equalize that problem area.

I would like to get into an area exclusive of athletics for a moment. You mentioned the Senator's remarks on title IX and how it applies to health insurance and pension benefits and I wonder if you could review for a moment the implications of the EEOC decision on prohibiting discrimination on mortality tables computing in regard to the single sex table.

Mr. O'HARA. Will you yield for a second on that?

We had 2 days of hearings on this last year as a separate issue, and it is a very complex one. I am going to suggest to the witness she give a brief answer to it and we take it up on another occasion.

Ms. SANDLER. I would just point out two things. One, that the HEW regulation has taken a stand that is a weaker stand. It is a weaker stand than that mandated by title VII under sex discrimination guidelines.

There is a case, I think, against the city of Los Angeles actuarial tables that were single sex and had a disproportionate effect and were violative of title VII.

Mr. BLOUIN. With respect to the chairman's decision not to get into it, I think there is some correlation that maybe we can bring out, but it would take a lot more time than we can use to get into it.

Mr. O'HARA. It is an interesting and complex subject.

Mr. BLOUIN. I would like to touch for a moment on Congresswoman Edith Green's quote that has been thrown around a little, and maybe ask you for your opinion on how you would define some of the phraseology that she uses.

She refers to the fact of using the funds and fees and tuition and so on as opposed to private contributions. Would you even in that context, let's assume for the moment maybe she is correct as to that, do you see even any indirect relationship between the availability of private funds to one sport on the campus that in turn would free up other moneys, that shouldn't necessarily, on an equal proportion, be then channeled to other programs within athletics?

Ms. SANDLER. One, I think it would be very difficult for me to speak for Edith Green. I would suggest that her words be examined separately from what I might say about the issue.

I think the area of people who give money for direct things is simply not all that clear from the regulations and it might be something worth asking someone from HEW to testify to.

I think what needs to be kept in mind, however, is that if such money is not covered by title IX, one would want to be clear it does not become diversionary to say, "OK, let's not use money for women's sports, but let's make sure all of the money comes from grants vis-a-vis contribution, and one wonders how much the institution itself was directly involved in getting such grants in looking for them. I would again say that I think two issues that are at stake here; one, it might be a way of allowing institutions some flexibility, but I think I would also look heavily to the *Griggs* kind of principle.

Two, does it have a disproportionate effect on females? If, for example, if you had a hypothetical institution only trying to get money for the football team and no other sport, that might be construed as having a disproportionate effect on opportunities for women. If, on the other hand, the school made a concerted effort to obtain funds for both sexes for both programs I think that might also be a different situation.

Mr. Blouin. That is an interesting point. I think the whole concept of arguing over narrow or broad interpretation can get you off the track of what we are trying to accomplish and setting back efforts of where we have to go.

I can think of numerous examples of things that are not directly funded with any kind of general funds. The admissions offices are one example that don't receive Federal funds and the congressional intent is clear we want that area covered under the Civil Rights Act. I don't care what title you talk about.

Ms. Sandler. Yes, it would be possible to have discrimination in all kinds of ways if you only cover direct funding. You can say, "The boys can't use the lunchroom there is not enough room," and they have to go out and they don't get the school lunches or the school buses. That doesn't get Federal funding, and they only let the boys use it. This happened at a school. The boys could use the bus on school athletics and the girls had to provide their own bus. That is illegal.

We would not want to provide money to schools which discriminate in some activities. If we give Federal funding consistent with court cases, it goes to institutions which did not discriminate in any programs unles mandated by law.

Mr. O'Hara. Thank you very much for your very cogent testimony on the subject. It was very well thought through, and excellent testimony, and will be very helpful to the committee.

Our next witness is Janet L. Kuhn, who is a member of the District of Columbia Bar.

STATEMENT OF JANET L. KUHN, ATTORNEY

Ms. Kuhn. Mr. Chairman, my name is Janet Kuhn. I am now an attorney in private practice in Washington, D.C., but prior to this year I served for 10 years on the staff of Congressman Alphonzo Bell of California and in that capacity I was extensively involved in various education-related legislation considered by this committee.

I am not appearing here on behalf of any client and I am not appearing as a representative of the firm with which I am now associated.

The views which I will express are my own, and were formed during my service as a congressional staff member. Those views are not necessarily shared by others in my firm or by any of our clients.

It is not my purpose today to discuss the merits or demerits of any particular provision in the title IX regulations. And I am not here to comment on whether individual provisions in the regulations do or do not represent desirable social policy.

It is my understanding that I was invited here today to set forth why I believe that the regulations are inconsistent with the statute from which they derive their authority (1) insofar as they provide for the termination of assistance to one program because of the existence of alleged discrimination in another program, and (2) insofar as they purport to regulate the general employment practices of universities, school districts, and other recipients of Federal assistance.

It is my contention that providing for the cutoff of funds to program "A" because of a finding of discrimination in program "B" is in direct contravention of the statute, court decisions, and relevant legislative history.

Mr. Chairman, I have some transparencies, which I would like to show to establish the context in which I have approached this question. They show that the operative words of title VI of the Civil Rights Act of 1964 and title IX of the Education Amendments of 1972 are identical. They also include the first version of title IX offered in the Senate.

If it is acceptable to the committee I could show these before going on with my formal statement.

Mr. O'HARA. Surely

Ms. KUHN. All that this says, for those who cannot see it on the top—you see operative words of title VI of the Civil Rights Act of 1964: general prohibitions against discrimination in federally assisted programs.

It reads:

> Section 601. No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Under that is the comparable section from the Education Amendments of 1972, title IX.

Section 901 provides:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination assistance * * *

The only two differences are that the first prohibits racial discrimination and covers all programs receiving Federal financial assistance and the second prohibits sex discrimination and covers only educational programs.

The compliance section of both sections are identical. The ultimate penalty for noncompliance is termination of Federal financial assistance.

Section 602 says:

> Compliance * * * may be effected (1) by the termination of or refusal to grant or continue assistance under such program or activity * * * but such termination or refusal * * * shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found.

That is what is known as the pinpoint termination provision which was added to the Civil Rights Act when the bill was in the Senate.

This slide will demonstrate that when the Congress wants to reach programs other than those which are federally assisted, as a matter of legislative draftsmanship, it knows how to do it. On the top you see another section from title IX, section 904.

It says:

> No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any educational program or activity.

You will notice that the programs referred to there include any course of study operated by a recipient, not just those that receive Federal assistance.

The Buckley amendment, section 438, has a similar configuration. "No funds shall be made available—to any educational agency or institution which has a policy of."

That encompasses everything done by the institution and not just the federally assisted programs.

Similarly, title IX, as originally introduced by Senator Bayh on the floor provided:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity conducted by a public institution which is a recipient of Federal financial assistance.

If this version had been enacted, clearly it would have covered every single thing done by any institution or educational agency receiving Federal financial assistance. If this had been the version that was enacted, I wouldn't be here today.

At this point, Mr. Chairman, I can proceed with my prepared statement.

PROGRAM OR ACTIVITY

Title IX of the Education Amendments of 1972 prohibits sex discrimination in any "education program or activity receiving Federal financial assistance." The original version of title IX would have prohibited discrimination in any "program or activity conducted by a public institution—which is a recipient of Federal financial assistance for any education program or activity."

HEW has interpreted title IX as if the original, institutionwide version, and not the programmatic version, had actually been enacted. Both versions provided that compliance could be effected by the termination of Federal financial assistance, but the version that was enacted, unlike its predecessor, included the so-called "pinpoint" termination provision which is idenfical to that contained in title VI of the Civil Rights Act of 1964:

> But such termination . . . shall be limited in its effect to the . . . particular program, or part thereof, in which such noncompliance has been found.

The words seem clear: If there is discrimination in program "A" then the funds to that program shall be terminated; the termination must be limited to program "A," however, and not extend to program "B" concerning which no finding of noncompliance has been made. Reference to the legislative history confirms that this provision was intended to have the commonsense meaning it appears to have.

In the words of Senator Pastore, the Senate floor leader for title VI, "Participation in one program would not justify the exaction of a nondiscrimination assurance concerning some other program." And as Chairman Celler pointed out to the Rules Committee:

> The Senate amendment makes clear that the Federal funds will be cut off for only those . . . particular programs in which discrimination is practiced. This means that all Federal aid . . . will not be cut off because one particular part of the program or institution is being operated in violation of the law.

Even before the inclusion of the pinpoint provision in title VI, the proponents of the Civil Rights Act contemplated programmatic specificity. Then-Attorney General Robert Kennedy was repeatedly asked whether a finding of discrimination in one program could affect the funds going to another program. His answer were consistent; the withholding of funds would be "as specific and particular as it could possibly be."

When asked "As a practical question, how could you separate them?" Senator Kennedy replied, "Well, I would figure out some way, Congresman."

Similarly, then-HEW Secretary Celebrezze was asked: "Must the discrimination under title VI relate to the particular program with respect to which the funds are withheld, or can you use the withholding as a means of [combating] discrimination in other programs?"

Secretary Celebrezze answered: "It would be my interpretation it would only apply to the specific program you are talking about."

Now, these references in the legislative history, Mr. Chairman, occurred prior to the insertion of the so-called pinpoint provision. The pinpoint provision according to its authors, was intended to clarify the meaning of the words already contained in the statute.

I might also add as a general matter, and this is not in the prepared statement, that title VI was contemplated as an alternative to amending, individually every single grant statute, as I am sure the chairman would recall.

If this language were contained in a particular grant statute it would be difficult to contemplate that that statute thereby covered every other statute. It does not make sense. The legislative history, however, does make clear this is one general across-the-board equivalent to an amendment of the several hundred statutes then in existence as was confirmed by the then Attorney General Robert Kennedy.

In spite of this seemingly clear statutory language and legislative history, HEW has nonetheless continued to interpret title IX as an institutional eligibility statute. In support of its position, it cites language from *Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) to the effect that a program might be so infected by discriminatory practices elsewhere in a system that it thereby becomes discriminatory. Certainly, this is a logical concept. It is not difficult to imagine admissions or counseling policies which steer members of one but not the other sex into a particular career-oriented federally funded academic program, for example, so that that program—which may itself be operated in a manner free from discrimination—nonetheless becomes discriminatory for all practical purposes.

The Taylor County "infection" dicta, however, have been used by HEW to obscure the holdings of that case. It is useful initially to note that HEW lost the Taylor County case, despite the fact that the plaintiff was a segregated school district. If HEW's present use of the infection dicta were in fact supported by the case, they would hace won it.

In Taylor County:

> The record shows that none of the findings of the HEW Reviewing Authority are programmatically oriented, at least if the term "program" is understood to refer to the individual grant statutes under which aid was given...It is also plain on the face of the order...that the termination of Federal funds is not "limited in its effect" to one or more of the Federally financed activities described in the grant statutes...Id. at 1072.

Since the case involved the termination of all Federal assistance without a program-by-program finding of fact that each program, individually, was discriminatory, the court focused on the "pinpoint" provision. In defense of its failure to find that a particular program was in fact discriminatory before terminating assistance to that program HEW argued that:

> (1) The statute imposes no affirmative duty on HEW to make findings of fact for each program, but creates only affirmative defense for the recipient in the event that some programs are untainted, and (2) the term program in the statute does not refer to individual grant statutes, but to general categories such as road programs and school programs. Id. at 1076.

The court expressly "reject[ed] HEW's interpretation of the term 'program' as that term is used in the statute." Id. at 1077. Referring to the abundant legislative history and the numerous lists of programs intended to be covered by title VI, the court observed that "all of these lists refer to particular grant statutes such as those before us, not to a collective concept know as 'a' school program or 'a' road program."

And with respect to the pinpoint termination provision—which is identical to that contained in title IX—the court said:

> It is important to note that the purpose of limiting the termination power to "activities which are actually discriminatory or segregated" was not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficaries of programs not tainted by discriminatory practices. Id. at 1075.

The court pointed out that the limitations on the termination power were not "mere procedural niceties peripheral to the purposes of the Act" but that "Congressional history indicates that limiting the scope of the termination power was integral to the legislative scheme." "HEW was denied the right to condemn programs by association" said the court.

> The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. . . . Schools and programs are not condemned en masse or in gross, with the good and the bad condemned together. . . .

Returning to HEW's other argument, Mr. Chairman, that it had no obligation to see to it that assistance is not cut off to a program that is not operated in a discriminatory fashion, the court answered the question of whose responsibility it is to protect nondiscriminatory programs from termination of assistance.

It said:

> The argument that the statute speaks not to the administrative agency terminating funds, but to the political entity whose funds are threatened, runs afoul of the language in the statute itself. The statute speaks to the "effect" of an order, not to its prerequisites. It states that termination "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." The only party with the power to limit the effect of a termination order is the administrative agency into whose custody the funds for a particular program have been committed. . . .

Furthermore, Mr. Chairman, the Taylor County court did not conclude, as it well might have, that all programs in a segregated district are so "infected" by the segregation as to become discriminatory themselves; an illegal condition affecting 99 percent of the district did not necessarily require the termination of funds to the other 1 percent, if that other 1 percent were in fact operating in a manner free from discrimination.

HEW, by contrast, has concluded that the existence of purported discrimination affecting a small portion of the activities of an institution does so infect everything in that institution as to give HEW the authority to terminate assistance to all programs in that institution. In the words of the Taylor County court, I would submit that:

> In order to affirm HEW's action, we would have to assume, contrary to the express mandate of [the statute] that defects in one part of a school system automatically infect the whole. Such an assumption in disregard to statutory requirements is inconsistent with both fundamental justice and without judicial responsibilities. Id. at 1074.

Mr. Chairman, I would like to proceed now to a discussion of the employment regulations:

Subpart E of the regulations implementing title IX prohibits "Discrimination on the Basis of Sex in Employment in Education Programs and Activities." Following each section of subpart E, HEW cites sections 901 and 902 of the Education Amendments of 1972 as the statutory authority on which it is relying.

It is quite true that title IX, as passed by both Houses of Congress, did in fact expressly prohibit sex discrimination in the employment practices of educational agencies and institutions, but this prohibition was not contained in sections 901 and 902, which are now being implemented as title IX. It was contained in (what would have been numbered) sections 906[1] and 908.[1] Section 906 extended the coverage of title VII of the Civil Rights Act of 1964 to educational agencies and institutions, which had previously been exempt. Title VII is administered not by HEW, but by the EEOC. Section 908 of title IX repealed the exemption for executive, administrative and professional personnel previously contained in the Equal Pay Act, which is administered by the Department of Labor. Both the Equal Pay Act and title VII of the Civil Rights Act of 1964 clearly prohibit sex discrimination in employment, but neither law confers jurisdiction for enforcement of this prohibition on the Department of HEW.

Senator Birch Bayh, Senate author of the amendment that became title IX, pointed out in a floor speech supporting his amendment that:

> Title VII of the 1964 Civil Rights Act has been extremely effective in helping to eliminate sex discrimination in employment. Unfortunately, it has been of no use in the educational field, because the title * * * exempts from its protection employees of educational institutions who "perform work connected with the educational activities of the institution. Therefore, the second major portion of this amendment (title IX) would apply title VII's widely recognized standards of equality of employment opportunity to educational institutions.
>
> In addition, to make sure that both men and women employees receive equal pay for equal work, my amendment would extend the Equal Pay Act of 1963 to include administrative, executive, and professional workers, including teachers, all of whom are presently excluded.

Note the reference to the employment provisions as the "second major portion of the amendment." The "first major portion" are those sections, 901 and 902, which HEW is now implementing as "title IX."

As it happened, prohibiting sex-based employment discrimination in educational institutions was a popular concept during the 92d Congress. While the education bill was working its way through the Congress, so was the Equal Employment Opportunity Act of 1972. The latter act also contained provisions repealing the title VII exemption for educational institutions.

While the education bill was in conference, the Equal Employment Opportunity Act was signed into law. Thus, by the time the education bill's prohibition against sex discrimination in employment came out of conference, there was no title VII educational institution exemption left to repeal—it had already been repealed. During debate, Senator Bayh referred to the fact that the title VII employment provision contained in title IX was the same as that contained in the EEOC bill. If the provision in the EEOC bill authorized the EEOC to enforce the prohibition against employment discrimination in educational institutions, the same provision in title IX must have had the same effect. Both provisions conferred regulatory authority on the EEOC; neither conferred it on HEW.

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[1] For consistency, these numbers are keyed to the eventual number, i.e., IX, which the sex discrimination title was assigned. The title was originally designated X; thus, the sections were numbered 1001, 1002, and so on.

It has been said that HEW's belief that title IX conferred employment authority on that Department rests on the fact that section 904 of the House bill was deleted from the final version. Section 904 provided that:

> Nothing contained in this title (IX) shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer * * *

This has been referred to as an exemption from employment originally in the bill which then was deleted. I would suggest this section, which was identical to section 604 of title VI of the Civil Rights Act of 1964, rendered title IX internally inconsistent. Section 904 said that nothing in title IX shall be construed to authorize employment action by any department or agency—but sections 906 and 908 did authorize such action, by the EEOC and by the Department of Labor. Removal of section 904 was, therefore, essential to the internal consistency of the title. Now, that left remaining in the title the operative words of 901 which HEW is now interpreting as "title IX."

It might also be helpful to look at the genesis of the same language as it appears in title VI. The original version of title VI of the Civil Rights Act as sent to the Hill by the Kennedy administration did cover employment. A later version of the administration bill, however, placed all employment jurisdiction within one title, that is title VI, and removed the employment provisions from title VI.

The legislative history makes clear that the then-remaining provisions of title VI, which are identical in operative effect to title IX, did not cover employment.

Attorney General Kennedy and Chairman Celler consistently pointed out that employment was not covered by title VI, but by title VII. As the Civil Rights Act moved through the Congress, however, the fact that the then remaining language in title VI was intended to protect only the beneficiaries of Federal programs—and not these employed to provide the benefits—was not clearly enough understood. In order to clarify the intended meaning of the words, therefore, the Senate added section 604.

Separating the purposes and procedures of title VI from the purposes and procedures of title VII is certainly not an unreasonable arrangement. If students are being excluded from participation in, or subjected to discrimination under a federally assisted program, and if remedial efforts fail, then the funds to that program must be cut off. But cutting off funds for student programs is not going to help an employee who was denied a promotion because of her sex—all that does is hurt the students. What the employee needs is the promotion she was wrongfully denied and the monetary damages necessary to restore her to where she should have been remedies expressly provided by title VII.

The legislative arrangement established by the Congress cannot be characterized as unreasonable; on the contrary, titles VI and IX protect beneficiaries of Federal programs and title VII protects employees, with the remedies in each title appropriately geared to the purposes of each title.

CONCLUSION

Mr. Chairman, I believe there are public policies at stake here that are at least as important as the need to eliminate sex discrimination. It is the legislative branch that is constitutionally empowered to legislate in the public interest, not the executive branch. If any agency finds that legislation is impracticable to implement as it is written, or that the legislation does not accomplish all that the agency thinks it should, there is nothing to stop that agency from seeking amendments to the statute. To improve a law by way of the regulatory process is to shortcircuit the constitutional prerogatives of the legislature.

Furthermore, Mr. Chariman, I believe that by selecting a statutory interpretation that maximizes the amount of Federal control that can be exerted over every level of education from preschool to graduate school, HEW has ursurped policymaking functions which under the principles of federalism belong properly to officials at non-Federal levels of Government. The desirable end—the elimination of sex discrimination—does not justify the means presently being used to achieve it.

Mr. O'HARA. Ms. Kuhn, I feel like jumping up and cheering at your conclusion, because it says much better than I what I have been trying to say ever since I authored the procedure that brings these regulations back to us again. God knows that Congress does sloppy work, and I am sure you will agree with that, having worked here, that a lot of it needs improvement. But the way to improve the work of the Congress is to come back to the Congress and say, "Now the way you wrote that statute is practically unenforceable, or at least very difficult to enforce. To really do this right we will have to amend the statute in the following ways, one, two, three, four."

Then let the Congress consider that and decide if it wants to do that. Then if it does, to go ahead and do it, not to supply the omissions of the sloppy Congress by executive action. There is a little thing called the Constitution that a lot of people keep forgetting about in all branches of the Government, which pretty well spells out the responsibilities of Congress for enacting laws. And it certainly does not give any power to enact law to the executive branch of the Government.

Your conclusion I am going to put on a tape or something. You know, it is just exactly what I have been trying to say around here. Maybe we didn't write a good statute.

Speaking of that, and I do have to speak of that for a moment, your research has been extremely thorough on the congressional intent, but I will bring you something that will really help you nail down the 904 business, I will bring you the minutes of the committee meeting of the Committee on Education and Labor that will display how 904 got in there.

If you want to know, 904 got in by mistake, by a drafting error. At my instigation in the committee the title, or what became title IX, was rewritten. You see, what title IX was brought to us it was brought to us as an amendment to title VI and I had a number of objections to that because I had a lot to do, I thought at least, with getting title VI into the Civil Rights Act of 1964.

Ms. KUHN. The research I did fully demonstrates that, Mr. Chairman.

Mr. O'HARA. All right. So I was very nervous about this effort to amend title VI because it opened up, it made all of title VI open to amendment when we hit the floor with the bill.

If you fiddled around with amending title VI, then you had a problem when you got to the floor with people who would jump up with other amendments to title VI having nothing to do with sex discrimination, and title VI would wind up being gutted on the floor.

So I insisted instead of amending title VI that we write and put into the bill a new title that was equivalent to title VI in terms of discrimination on the basis of sex, but it would not then, in a parliamentarian sense, open up title VI to amendments on the floor.

The staff was given overnight to draft this whole thing and they goofed, 904 got in there by mistake. It was a cut and paste job. There was a Xerox of the Civil Rights Act that they just pasted in.

Then when we got around to straightening things out in conference we improved the drafting and dropped it out.

Now, great significance is being given to the fact that it was dropped out. It was dropped out because it got in through a drafting error. So the quiet, easy way to get it out was to slide it out somewhere along the line without having to go through a long explanation as to how it got in. So much for that part of the argument.

I would like at this time to yield to the gentleman from California, and I know he is not a member of this particular subcommittee because he claims some of the credit for your fine testimony. I doubt that he is entitled to it, but I will yield to him.

Mr. BELL. Mr. Chairman, I must say that I am not entitled to it. It is a great pleasure, Janet, to welcome you before the committee and to say, Mr. Chairman, that Janet worked with me for 10 years and it was my good fortune to have one of the most able staff members I have ever had. It is indeed an honor to welcome you, Janet, but I won't take much time because we do have a quorum call. I think you know something about mistakes made in Congress, so I will just say again that it is a real honor and a pleasure to have you here; lots of luck to you, and I agree with everything you say.

Ms. KUHN. Thank you, Mr. Bell. I didn't expect to be on this side of the table so soon after leaving that side.

Mr. O'HARA. There gentleman from Minnesota.

Mr. QUIE. Janet, it is a pleasure to have you here. I know of the work you did as a staff member for Congressman Bell in drafting educational legislation, and I know that you were very active in the development of this part as well, so you are a person who would be comparable to a staff person on the committee who had worked with the legislation all the way through. I appreciate your addressing yourself to the question of whether the Department of Health, Education, and Welfare has gone beyond its authority under the act.

I think we have a tendency to become so concerned about social implications we don't look at the fine points of the law to determine whether the Department is going beyond its authority.

While it may look like it is acceptable now because of the interest in protecting the rights of women, in the long run we get into severe difficulty if we operate not by law, but rather by emotions and feelings that people have.

The recent history of our National Government is a good indication of the problems we can get into.

Now, the question I have to ask is this: You make, I think, an excellent point that the Department of Labor should not then assume the responsibility, of authorizing employment action under title IX and also that you cannot terminate the money in program B if there is no discrimination in program B but there is in A.

What about this situation in athletics?

I recognize that following your logic, money could not be terminated in athletics because there is no Federal money going to athletics, but do you feel that we do not have authority to write regulations affecting athletics because there is no money going to it?

Ms. KUHN. The scope of the termination power, is, I suggest, the same as the scope of the statute; that it, what you are looking at is programs which receive Federal financial assistance. If, by looking at a program which received Federal financial assistance you can see that activities or policies elsewhere in an institution—admissions—for example, and I regret, Mr. Chairman, I am not a higher education specialist, this was not Mr. Bell's subcommittee, so some of the examples I will draw are from the elementary and secondary area, but I could imagine a situation, for example, where you have a federally funded vocational education program and you have nonfederally funded guidance and counseling procedures. Those guidance and counseling procedures might suggest, by their content, and the atmosphere of the school might be such that everybody knows the girls can take welding if they want to, but we just don't do it and the counselor suggests it is not lady-like.

The discrimination is then occurring elsewhere, not in the welding program. That may be operating just fine. But girls are, in effect, excluded from participation in that Federal program. Therefore, to the extent that policies outside of the Federal program can cause the Federal program itself to be discriminatory in that people are excluded from it, denied the benefits of it, or subjected to discrimination under it, then to that extent programs other than those which are actually federally funded are relevant to the determination of whether or not there is discrimination in the particular program.

On that—well, I should not anticipate what I think is a question. But I have heard so many people refer to the fact that the admissions offices are not federally funded, that admissions are not a federally funded activity and admissions are not a federally funded program. It is certainly true and I point to the fact that section 901 specifically exempts certain admissions policies, single sex undergraduate institutions, for example, as if somehow or other this meant since admissions go institution wide, therefore everything else goes institution wide.

I think this is misreading the statute. The statute says no one can be excluded from participation in a Federal assistance program.

If an institution is operating a federally assisted program and members of one sex are excluded from admission to the institution, they are excluded from everything the institution does, including the Federal program.

For example, there is a quota system, and if a quota system in admissions operates to exclude members of one sex disproportionately from participation in the Federal programs operated by this institution, clearly admissions is a covered procedure in that sense. Therefore, to the extent that Congress wanted to permit the continued existence of single sex institutions which can be eligible for Federal assistance, they did have to exempt that which they did not want included because otherwise all admissions to every educational institution would have been included in title IX.

Mr. Quie. Let me ask you then about the student assistance program as it affects some of the other programs with Federal support and also those programs in the institutions which do not receive Federal support. Many of the witnesses have indicated that they feel since the institution receives Federal student assistance or the student receives Federal assistance, I think "assistance by the institution" might be a proper way to put it, then the Federal program or activity which is referred to in 901 applies to all programs. Interestingly, Senator Bayh yesterday did not feel that way. I was wondering about your view on that matter.

I would like to ask a related question. Is there a difference in student assistance, because BEOG, SEOG, and NDSL are programs administered by the institution only for the benefit of the student whereas a work study program can be operated to benefit the institution as well.

Ms. Kuhn. Certainly any institution whose financial aid officer uses discriminatory judgment—again I didn't follow your hearings on the higher education assistance program—but I understood there was evidence, for example, that a female student who was married would receive a lower assistance grant or loan, or would be approved for a lower amount of loan or lower BEOG grant because she was married, because of the stereotyped presumption that if she is married she has a husband supporting her.

To the extent any such practice existed, it is in direct violation of the statute, I believe, because a direct loan or basic grant, well, is it an education program—I suppose you could split hairs, but I think the committee thinks so and it comes out under education bills, so I think any institution that was employing practices like that would be prohibited from doing so.

Mr. O'Hara. What about the Bob Jones University case?

If the students at the institution are recipients of Federal grants, Federal loans, federally insured loans, federally funded direct loans, does that, and the students, of course, are in all kinds of activities at the institutions, does that place all of the acts of the institution under this title?

Ms. Kuhn. Could you refresh me on Bob Jones?

Mr. O'Hara. That is the Veterans' Administration case where Bob Jones University, as I understand it, did not participate in the Federal programs but a number of students under the GI bill were attending Bob Jones University.

Ms. KUHN. Was Bob Jones a totally segregated university?

Mr. O'HARA. It was a title VI case, but I think it is all white.

Ms. KUHN. You know it is a little mushy when you get into that kind of thing, but when dealing with a fully segregated institution there is no way that the Federal dollars can be spent in a manner free from discrimination. If every dollar spent in the institution is spent in a discriminatory manner, that includes the Federal dollars. I think some one can argue that to the extent there is across-the-board discrimination, they have a problem.

Mr. QUIE. If you have time I would appreciate a memo from you with respect to the Bob Jones case and title IX as it affects an institution and its discrimination.

Ms. KUHN. Yes.

Mr. O'HARA. Thank you very much for your very helpful statements.

Ms. KUHN. Thank you, gentlemen.

If Bob Jones was fully segregated, the issues are different in terms of does the existence of a student grant—and of course the guaranteed student loan program is exempt from title IX because assistance by way of guarantee is not in title IX—but basic opportunity grants and direct student loans are certainly within that statute.

If you are to use the indirect receipt of a student assistance dollar as a way of reaching everything done by the institution, if that were suggested as an interpretation of the law as distinct from another suggestion which would say that Congress appeared to restrict this to the direct Federal programs and, indeed see to it that programs which were not discriminatory were not cut off, I think, you would have to choose the latter interpretation to be consistent with the legislative history and the statute itself.

Mr. O'HARA. I think that is the area which HEW finds its greatest legal support anyway for the broad coverage they give it. I mean, I know that maybe they don't think so, but I always used to think, until I became chairman of this subcommittee, that student assistance was student assistance, and after I proposed changes in it and started to hear from institutions I discovered it was a disguised institutional assistance and not student assistance.

I know the gentleman from Minnesota knows what I am talking about. In any event, you know, clearly, there is an institutional aid aspect, because whenever someone proposes changing a program a little bit they immediately hear from institutions saying: Wait a minute, your change will hurt our kind of institution or would help some other kinds of institutions.

They really think of it as being not only aid to students but aid to the institution, and much of what we fight over is whether or not a particular form of aid is fair to one kind of institution or another kind of institution as compared to whether it is fair to the student.

Mr. QUIE. Will you yield?

You talk about an institution totally segregated by race and we know that is not permitted; however, totally segregated, based on sex is permitted under title IX.

Ms. KUHN. And under the Constitution.

Mr. QUIE. I wanted to ask you about that. One can logically conclude with regard to sex title IX is not being given full force and effect as we see it enforced now, as for instance title VI is enforced with regard to race.

Ms. Kuhn. This gets into a fairly complicated legal situation which I didn't get into, because it really is complicated and I am not fully capable of dealing with it at this time. There was the understanding that the title VI requirements were requirements of the 14th amendment, and if you couldn't do it under the 14th amendment you couldn't do it under title VI.

The standard was the same; the discrimination which would cut off the money, would also violate the 14th amendment, at least as far as schools are concerned.

The constitutional standard applied in the area of sex discrimination is still evolving and there are those who would not want to fully agree that the Supreme Court has finally made up its mind. At least so far, however, we would have to admit that the Court is unwilling to treat sex as a suspect category and therefore is unwilling to apply the more rigid 14th amendment test, that there must be demonstrated a compelling State interest rather than a reasonable relationship to a legitimate State interest.

If it is concluded, for example, that, well, it was concluded—there was a Supreme Court case which affirmed a State operating a single-sex university, because it found that other universities' facilities were available to the other sex; that certainly sounds like separate but equal.

You cannot—even though the operative words of both statutes are identical, and with respect to what do the words actually mean, you can look to the legislative history of both statutes. But when you implement the statutes, the constitutional standards are different and it can be argued, for example, that to the extent that the title IX regulations are not tied in to Federal money, and therefore not justified as a control of the expenditure of Federal dollars, to the extent that these regulations therefore exceed the requirements of the 14th amendment they are not authorized. You have a case, *Aiello* v. *Giduldig*, that upheld California's disability program despite the fact that it failed to provide maternity benefits and the Court held failure to provide them was not a violation of the 14th amendment.

So if Congress were to pass a law requiring maternity to be treated as a disability and requiring the State departments of education to implement that, it would seem that Congress would have to base its justification for regulating a State government agency on the 14th amendment, on section 5 of that amendment, which provides that Congress can enforce the provisions of the 14th amendment with appropriate legislation.

If you have the Supreme Court saying there is no 14th amendment violation, it is anomalous. I have not briefed this subject, Mr. Quie, and that gets into individual regulations.

Mr. Quie. Let me go back a moment, Mr. Chairman; do you have other witnesses?

Mr. O'Hara. We have one more witness and we will be voting fairly soon.

Mr. Quie. OK. I want to go back to the question of student assistance and the regulations—it says "scholarship loans, grants, wage, or other funds extended." and so forth. That is what I referred to as constituting Federal financial assistance.

Ms. Kuhn. Are the scholarships provided by the Federal Government?

Mr. **Quie.** The question I have is, is the Department overextending its authority when it says "Federal financial assistance will mean" and among them are scholarships, grants, and so forth?

Ms. **Kuhn.** Is a student aid program an education program?

Mr. **Quie.** Program or activity.

Ms. **Kuhn.** I can see your point. I think it can possibly be argued that it is not.

On the other hand, they are Federal dollars and if the basis for title IX is to see to it Federal dollars are not spent in a manner that discriminates against a person on the basis of sex, I can see a reasonable interpretation there of including them.

Now the question is, if there is discrimination in that program, what aid are you going to cut off?

Mr. **Quie.** The question really is not whether the discrimination is in the admissions policy, but if there is discrimination elsewhere in the institution which has students attending who are assisted by scholarships, grants, et cetera.

Ms. **Kuhn.** I think I am not understanding. You mean the fact th assistance received by the student goes into the general——

Mr. **Quie.** No, the students receive Federal assistance.

Ms. **Kuhn.** Right.

Mr. **Quie.** They are in a program and receiving student assistance. Some of them are not permitted to attend or be involved in intercollegiate athletic activities. Can you then say that the institution receives Federal financial assistance for a program and activity?

Ms. **Kuhn.** I believe that HEW certainly believes you can. By tracing that through, what you have done there is you have looked at the athletic program, and I hate to use any examples in the athletic area because everybody is talking about that. But if there is discrimination in the athletic area and you find discrimination, the question arises, "What programs do you then terminate?"

In other words, approaching it, well, the statute says, "Terminate assistance to the particular program in which you made a finding of noncompliance." So if you find noncompliance in the athletic area, you cut off Federal aid to the athletic area. If someone can trace Federal dollars on some sort of percentage basis and maintain, therefore, that they are limiting termination of the Federal assistance to the particular program in which there is discrimination, maybe, but I think that is one of the mushy areas that HEW should have come back to the Hill on, to be truthful. Putting the same thing in a different context, elementary and secondary, you have a school district with single sex tumbling classes at the junior high school and that is considered discriminatory under the title IX regulations. That school district received title I money, title II and some title VII bilingual money. The programs operated under titles I, II, and VII are in the elementary school 5 miles down the road from the junior high and you find discrimination in this junior high, do you thereby terminate funds to the title I program in the second grade? Doing so seems inconsistent with the very face of the statute.

Congress contemplated HEW looking at each Federal program on a Federal program by program basis and figuring out how it was going to interpret the ways in which the Federal dollars in that program could be used in a discriminatory manner so they can then adjust the regulations to use of those dollars.

HEW, by taking an across-the-board interpretation, said everything done by the institution is within the regulations. They have gotten out of having to go through that program by program analysis. If they had gone through it perhaps 3 years ago, they would have discovered that some of these areas are difficult.

You do have a congressional intent which would indicate programatic specificity which would conflict with an interpretation that the receipt of student assistance thereby brings everything done by the institution within the scope of the statute.

There is a conflicting interpretation. I think a reasonable person could have trouble looking at that.

Along that line, Mr. Quie, I heard people refer to the fact that the receipt of Federal dollars frees up dollars from other sources so that everything in the institution benefits from the receipt of the Federal dollars directly or indirectly.

Again, looking at the elementary and secondary level, and it differs program by program, I am sure, but the categorical programs I am familiar with provide by law that the Federal dollars must supplement and cannot legally supplant the dollars which are raised from State and local resources.

If title I money is supplanting local resources, thereby freeing local resources for other purposes, it is in direct violation of the statutory language providing for title I assistance. The receipt of program money under those programs can in no way be said to be beneficial to other programs in the system, because, if they are, that system is admitting it is violating the law. And HEW is admitting they let them violate the law.

Mr. QUIE. Thank you very much. I think it is important that we take a look at that question of student assistance and I agree with your answer.

Mr. O'HARA. The last witness is Dr. Nellie M. Varner, the director of Affirmative Action from the University of Michigan, appearing today representing the National Association of State Universities and Land Grant Colleges, and the Association of American Universities and the American Council on Education.

Dr. Varner, we will be pleased to hear from you.

STATEMENT OF NELLIE M. VARNER, DIRECTOR, AFFIRMATIVE ACTION, AND ASSISTANT PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF MICHIGAN, APPEARING ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN COUNCIL ON EDUCATION, AND THE ASSOCIATION OF AMERICAN UNIVERSITIES

Ms. VARNER. Mr. Chairman and members of the subcommittee. I am Nellie Varner, director of Affirmative Action programs at the University of Michigan, and I am assistant professor of political science at that university.

I am accompanied by Donna Shavlik, assistant director, Office of Women in Higher Education, American Council on Education.

My appearance before the committee today is on behalf of the National Association of State Universities and Land-Grant Colleges, the American Council on Education and the Association of American Universities.

I want to thank the committee for the opportunity to speak in support of title IX of the Higher Education Amendment of 1972.

I have a prepared statement which I will submit for the record, but I would like to spend a few minutes that I have on highlighting some of the points in the prepared statement that are of concern to the associations.

Mr. O'HARA. Dr. Varner, without objection, your statement will appear in full in the record of the hearings, as well as your highlights.

Ms. VARNER. Thank you.

[The statement referred to follows:]

PREPARED STATEMENT OF NELLIE M. VARNER, ON BEHALF OF THE NATIONAL ASSOCIATION OF STATE UNIVERSITIES AND LAND-GRANT COLLEGES, THE AMERICAN COUNCIL ON EDUCATION, AND THE ASSOCIATION OF AMERICAN UNIVERSITIES

Mr. Chairman and members of the subcommittee, I am Nellie M. Varner, Director of Affirmative Action and Assistant Professor of Political Science at the University of Michigan. Today I am appearing before this Subcommittee on Postsecondary Education on behalf of the National Association of State Universities and Land-Grant Colleges, the American Council on Education, and the Association of American Universities. I wish to thank the Committee for the opportunity to speak in support of Title IX of the Higher Education Amendments of 1972.

Let me begin by recommending that the Subcommittee not delay or prevent Title IX from becoming effective on July 21, 1975. The passage of Title IX is both timely and morally appropriate. After hundreds of years of discrimination and inequality in our institutions of higher education, the time has come to provide women with equal opportunity in all educational programs. It is profligate to restrict the development of human talents for reasons of sex. To discriminate unjustly is to be inhumane, and the loss experienced by one social group directly impacts on all others in society. In recent years, progress toward equal opportunity in higher education for minorities has been lagging. Since half of minority groups are women, the implementation of Title IX, can give greater impetus to the furthering of equality for minorities, as well as for women in general.

SCOPE OF "PROGRAM" AND "ACTIVITY"

In order to implement the intent of Title IX, that is, to prevent discrimination on account of sex in admissions, access and employment, it is reasonable to interpret the wording of the statute "education program or activity" to apply to the total educational program of the institution. We recognize the controversial nature of this issue, but we respectfully submit that any other interpretation would not only severely limit the impact of Title IX and its intended purpose to eliminate unequal treatment of women and girls, but also it would be impossible to administer. For instance, if only a specific program within the political science department measuring community voting patterns were federally supported, then opportunities for women would be protected by Title IX for that "program" whereas the remainder of the political science department could legally discriminate. The narrow interpretation means that some residence halls built with private monies would be allowed to discriminate whereas those built with Federal funds would not.

Certainly, good management of resources demands the even administration of policies and procedures. Title IX regulations as presently written would allow for a case by case determination of the extent to which one program affects or infects the entire educational program of the institution or school system. Precedence for this procedure is to be found in the court interpretation of Title VI of the Civil Rights Act of 1964.[1]

CHANGES ALREADY UNDERWAY

As of this date many institutions already have begun to respond to the spirit of Title IX. One year ago, at the University of Michigan every school and college was asked to review its recruitment, admissions, financial aid, and other policies and procedures for possible discriminatory practices in light of the proposed Title IX regulations. Some of these policies are already being modified to assure equality to both men and women.

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[1] Civil Rights Act of 1964, 42 U.S.C. § 2000d(1). Title VI prohibits discrimination on the basis of race, color or national origin in all federally assisted programs. Title IX was patterned after Title VI; the legal sanctions for noncompliance are identical under both statutes.

The final regulations now incorporate the essential first step in the implementation of Title IX-self-evaluation. I believe there is no other way to begin this process. Self-evaluation traditionally has been a means used by colleges and universities to assist with the formulation of sound educational policy. Furthermore, it allows the institution to design and institute new policies and procedures which correct unwitting discrimination. In addition, as an affirmative action officer, I would like to point out precedents in past anti-discrimination legislation.

Language contained in the Higher Education Guidelines, Executive Order 11246[2] and the Office of Federal Contract Compliance Obligations of Contractors and Subcontractors[3] specifically refers to systematic examination of all employment policies to assess the extent of discrimination. In addition, the Affirmative Action and Equal Employment Guidebook[4] of the EEOC discusses the institutional advantages of self-audit.

Institutions in addition to the University of Michigan also are undergoing a self-evaluation, and are placing in motion corrective measures. Thus, a delay in the implementation of Title IX would be unfair not only to women but would constitute a regression to progress already achieved. The assessment process in higher educational institutions has taken place because the major thrust and objectives of the Title IX legislation were just and reasonable. The regulations for implementing Title IX, which the President has signed, also appear to be reasonable and practical, and should be given an opportunity to be tested in educational institutions.

The current regulations reflect a significant improvement over the draft circulated a year ago. The Department of Health, Education, and Welfare obviously gave serious attention to the many comments and recommendations made by institutions at that time. We can live with these regulations.

However, I do not mean to say that there are not still some problems, but I believe they are manageable. Let me elaborate:

1. Grievance Procedures—Section 86.8(b) Subpart A: There will be some difficulties with requiring recipients to establish grievance procedures to resolve student and employee complaints about actions prohibited by the statute. Many institutions probably do not have student complaint procedures and these would have to be established. Most institutions have employee complaint procedures but they have proven to be slow, cumbersome, and of limited effectiveness, since any internal decisions are subject to review by an outside agency in discrimination cases. There is no persuasive reason to believe that complaint procedures in the student area will be more efficient or effective. Procedures for both students and employees can be created in institutions where they do not now exist. However, the establishment of any such procedures, while good management practice, in that they provide for review at the institutional level, would still face an existing limitation: regulations do not provide for Federal agency review or deferral to that procedure.

2. Opportunity for study at a foreign institution—Section 86.31(c) Subpart B: The long standing personal prestige and subsequent opportunities afforded by the Rhodes scholarships are virtually undisputed. It is, therefore, important to point out that the provision of "reasonable opportunities for similar studies for members of the other sex" does not automatically create an equivalent award to such prestigious programs as the Rhodes scholarship. Great care will have to be exercised in constructing programs of foreign study for all students in order to assure equity.

3. Education Programs and Activities—Section 86.31(b)(2) Subpart B: This section of the new regulations repeats the prohibition against providing, on the basis of sex, "different aid, benefits, or services." Strict adherence to this prohibition may have an adverse effect on a number of programs and services, such as internship programs for women, women's employment counselling or women's advisory committees initiated in many institutions in behalf of women. It is not clear whether any or all of these types of programs and services would be permitted under the "affirmative action" clause of the regulations.

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[2] U.S. Department of Health, Education, and Welfare, Higher Education Guidelines, Executive Order 11246, 1972.

[3] Ibid., p. B9 and C1.

[4] U.S. Equal Employment Opportunity Commission, Affirmative Action and Equal Employment—volume 1, 1974.

4. **Remedial Action and Enforcement Procedures—Section 86.3(a) Subpart A:** The present version of the Title IX guidelines makes remedial action an integral part of the body of the regulations rather than the "procedures" subpart (F). A slight "Catch 22" problem is entailed in this organization. Section 86.3(a) requires the institution to take such remedial action as is deemed necessary by the director on a finding of sex discrimination. However, Section 86.4(a) makes acceptance of this remedial order a part of the assurance of compliance that the recipient must file in order to apply for federal assistance. While it might be argued that remedial action could be a requirement or sanction upon a proper finding of violation of Title IX, its inclusion as a part of a required assurance of compliance is almost like pleading guilty in advance.

ATHLETICS

From reading the newspaper, looking at the list of witnesses that have appeared before this Committee, and assessing public knowledge of Title IX, one would think athletics the only issue addressed in these Regulations. We certainly believe that athletics are an integral part of the educational process of educational institutions; we also know that gross discrimination has existed in athletic programs for women in institutions of higher education and that change in this area of campus life is necessary. Some changes involve scheduling of facilities and other relatively simple management logistics. Other changes require re-examination of priorities, discussion of values, and allotment of funds. These are more serious problems that have many dimensions and require the best talents of the men and women directly involved and the prespective of the rest of us for solutions.

It seems that the regulations as promulgated allow for reasonable solutions if the ultimate outcome of equal opportunity is agreed upon. Therefore, we recommend that Congress retain the athletic provisions of the regulations, but recognize that institutions need flexibility in determining how to provide equal opportunity in this area.

I have outlined for you some of the problems we feel will be encountered in the implementation of these Regulations. None of these problems are insurmountable; therefore, the Associations I represent wish to urge that July 21, 1975 remain the effective date of the Title IX Regulations.

RECOMMENDATION TO PRESIDENT CONCERNING PROPOSED REGULATIONS ON TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 ADOPTED BY THE NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, MAY 16, 1975

The National Commission on the Observance of International Women's Year has as one of its primary mandates the full and proper enforcement of existing Federal legislation banning discrimination on the basis of sex.

The regulations to implement Title IX of the Education Amendments of 1972 are now awaiting approval by the President. This law is the first banning discrimination on the basis of sex in all education programs and activities receiving Federal financial assistance.

There are four areas of the draft regulations of particular concern to the Commission. As they stand, they do not appear to reflect the intent of the legislative history. Thus the Commission recommends that the President consider the following recommendations:

1. The present version requires resort to internal grievance procedures, which may be unduly prolonged. We recommend allowing complainants the option of using internal grievance procedures, if an institution has them, *or* filing complaints directly with the Department of Health, Education and Welfare. The complainant would, of course, have the option of filing with both HEW and using the internal grievance procedure.

2. A new provision is needed which would require the recipient of Federal assistance to conduct and publish self-evaluation to assess its status in regard to existent sex discrimination. This evaluation should cover admission practices, financial aid, educational program access, curriculum, and athletics, as well as employment.

3. We recommend the establishment of a uniform pension policy under the existing Federal legislation now covering employment. The EEOC guidelines, which require equal periodic benefits, would appear to be more equitable, and we would recommend that the Title IX regulations reflect this approach.

4. The section on athletics has been unduly weakened. We recommend deletion of the references to contact sports and replacement of the athletic sections with the language of the June proposed draft.

The Commission further urges the President to sign the regulations within the next few weeks so that the school year will begin with the regulations in place.

A Draft for a Sports Bill of Rights

Inasmuch as women have been relegated to an inferior position in a male-dominated sports world and inasmuch as we have not been allowed to share equally in the decision-making bodies that determine sports policy, we have promulgated the following Bill of Rights to give us our equal share in a more equitable sports world.

1. That women of all ages have the right to participate in all sports of their own choosing rather than in a few sports of men's choosing.

2. That all schools and colleges have equitable athletic facilities and equitable funding for women's and men's sports rather than minute funding for the women/girls and exorbitant funding for the men/boys.

3. That all governing sports bodies that claim jurisdiction over women/girls and men/boys have equality of women's representation on the ruling committees and on all subcommittees, viz., the Olympic Committee, the United States Lawn Tennis Association and International Lawn Tennis Federation, the National Softball Association and Federation, the International Amateur Athletic Federation, the National Federation of State High School Athletic Associations, etc.

4. That brochures and news releases from schools and colleges regarding athletic teams and events give equal information on women's and men's teams and competitions rather than almost exclusive coverage to men's sports.

5. That schools, colleges and universities give equal consideration to qualified women as athletic directors and coaches rather than exclusive consideration to men.

6. That the media recognize their responsibility in giving equal importance in their coverage of local, national and international women's athletic events rather than predominant coverage to men's athletic events and little or no coverage to the women.

7. That the media hire an equal number of qualified women to report and commentate on sports rather than an exclusive coterie of men, and that the TV media judge the competence of the women in their hiring practices rather than hiring on the basis of good looks for women and alleged competence for men.

8. That manufacturers of toys, games and sports equipment eliminate sexist language and illustrations in both the outside packaging and advertising of their product since this is a visible attempt to play up the so-called masculinity of the toy or game.

9. That local or national sponsors who claim to be giving sports opportunities to children avoid concentrating exclusively or almost exclusively on boy children to the detriment and neglect of girl children.

10. That state and national athletic Halls of Fame give equal consideration to the nomination and election of women athletes and that Halls of Fame in such individual sports as golf and tennis have an equal number of women directors to nominate and elect candidates.

We the undersigned[1] solicit the endorsement of this Bill of Rights by all sports-conscious people and their active condemnation of all organizations federations, schools, colleges, corporations and/or media who violate any of the provisions herein.

Dr. Carole Oglesby, Sports Study Consultant, U.S. Center for International Women's Year, 1975; Ms. N. Peggy Burke, President-Elect, Association of Intercollegiate Athletic Women; Ms. Elizabeth East, Collegiate Champion Gymnast; Ms. Wilma Heide, National feminist leader and former president, NOW; Dr. Nell Jackson, Former Olympian and Assistant, Athletic Director, Women's Sports, Michigan State University; Ms. Joan Joyce, World Champion Softball Player; Ms. Barbara D. Lockhart, Former Olympian 1960, 1964; Assistant Dean, College of HPERD, Temple University; Ms. Cal Papatsos, Director, NAGWS National Conference on Women in Sport; Ms. Roberta Ramo, At-

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[1] The signers were brought together as sports consultants for the U.S. Center on the International Women's Year and the State Department.

torney, Specialist in legal rights of women in sport; Ms. Bessie Stockard, Virginia Slims player and coordinator, Women's Athletics, Federal City College; Ms. Gladys M. Heldman, Founder, World Tennis Magazine and Founder, Virginia Slims Circuit.

Ms. VARNER. First let me say that we would like to urge the subcommittee not to take any actions which will prevent the regulations from becoming effective July 21. We feel that the statute is timely and morally appropriate; that women have waited a long time. There has been a great deal of discrimination in the universities, a great deal of inequality, and we should now move forcefully to implement the regulations.

We feel it is inhumane to discriminate, a loss which we know from the experience of one group in society, impacts on all other groups, and this is directly related to the problems now experienced by minorities where there has been a lag in their progress in the area of higher education, and to move forcefully on this point of the title IX regulations can give impetus to greater equality for minorities as well as women.

We also would like to comment on the problems relating to the scope of coverage of title IX regulations.

We realize there is a great deal of controversy regarding the definition of educational program activity. We feel that it is only reasonable to interpret the wording of the statute to encompass the total educational programs of the institution.

HEW appears to have made a very reasonable and responsible and moderate interpretation by using the title VI precedent as a guide for title IX. The case cited in the regulations, *Taylor County* v. *Finch*, a case based upon interpretation of title VI regulations, is a very modern and responsible case which allows protection for institutions by admitting that funds are not automatically cut off from institutions just because of discrimination in one particular program, but it does allow for the fact that one particular program on a case-by-case basis can be affected by discriminatory practices in the entire institution.

We feel that to give any other interpretation to the definition of program activity would severely limit the impact of title IX regulations.

Moreover, they may be impossible or very difficult to administer. For example, to take a large university like the University of Michigan, we have residence halls that are privately funded and indeed discrimination could take place, while those that receive Federal funds would not be permitted to discriminate.

Similarly, in various programs throughout the universities one project which is funded by Federal funds could not discriminate while the next office which is not funded by Federal funds would be allowed to discriminate.

So we would like to urge the continued recognition of the applicability of title VI interpretations to title IX regulations.

Many changes we would like to point out are already on the way in institutions, changes that are responding to the spirit of title IX even before the regulations have become effective. As early as a year ago when the proposed regulations were issued, the University of Michigan and a number of other institutions began the process of self-evaluation in which they asked their schools and colleges to review the policies and procedures, and the practices that are occurring by the provisions of title IX, including areas such as admissions and financial aid.

Almost invariably, very serious and insurmountable problems were not uncovered. There were some problems with respect to sex-restricted scholarships, some problems in some areas relating to housing, and some alterations that had to be made as well as some problems relating to areas such as testing and counseling, but we noticed in the revised regulations HEW seems to have given considerable attention to the comments offered by many institutions that the regulations as currently worded reflect an improvement which institutions can live with.

Moreover, there are many precedents that have already been set up under the Executive order implementing the higher education regulations for 11246 which allow institutions, or urge and stress that institutions should engage in self-evaluation.

We feel that this certainly is a very viable provision in the title IX regulations. Therefore, we would like to urge that the regulations, or the gains that have been made should be allowed to remain and that the regulations should be allowed to be tested in the institutions and areas of discrimination which are not now feared that can be worked out over a period of time.

In other words, we believe that the problems that still exist are manageable problems.

Let me take a minute or two to highlight what some of the possible problems could be.

One section of the regulations suggests that institutions establish complaint procedures. Many institutions, including my own, do not currently have complaint procedures for students. We have complaint procedures for employees. These are working with varying degrees of effectiveness and efficiency.

We notice that the current regulations have not provided for a Federal agency deferral to institutional procedures. Of course, this is a weakness. Nevertheless, we are pleased to see the inclusion of this provision, because it does allow management, as under the Executive order, to have the first opportunity to review its own practices and policies to make every effort to conform to both the letter and spirit of the law by correcting practices and policies where they have disparate impacts.

We also note that the section providing for opportunity to study abroad is one which will possibly cause some serious problems. The Rhodes scholarship, for example, is a very prestigious scholarship and subsequent opportunities are derived from having been awarded one of these scholarships.

Now, the regulations as currently worded would provide an opportunity for study by members of the other section, but this does not automatically create an equivalent prestige or subsequent opportunity as is now attached to the Rhodes scholarship.

We feel that great care will have to be taken to provide equal opportunity for women in this area.

Now, the current regulations prohibit providing on the basis of sex differences in aids and services. These institutions in the last few years have moved to establish a number of programs directly to benefit women. Some of these are internships, for example, as we have at the

University of Michigan, have various offices to provide women's programs or women's advisory committees and, of course, the regulations as currently worded do not clarify whether these kinds of programs would be permissible under the affirmative action section of the regulations, so there could be some adverse impact on special programs that have been established for women.

The remedial action is another area that presents some dilemma for institutions. One section of the regulations requires institutions to take remedial action upon a finding of discrimination, while the next section makes acceptance of this remedial action a part of the assurance of compliance that a recipient must file to apply for Federal assistance.

Therefore, there appears to be some requirement for advance acquiescence of guilt: nevertheless, we feel that these are problems that can be managed and we do not think that we can wait for a perfect law. So we urge the committee not to be unduly concerned about some of the problems associated with the regulations and to move forward and let the implementation take place.

Let me just comment in concluding on the athletic area: we are aware of the tremendous amount of debate and controversy surrounding applicability of title IX to athletics. I really do not wish to get into a great deal of detail in this area. We think it is better that the experts work out the problems, but the Associations do believe that athletics compose an integral part of the educational process of educational institutions and we are aware, and we know that gross discrimination in athletic programs for women had and does occur still. It seems that these regulations, as promulgated, allow for reasonable solutions in this area. Therefore, we wish to recommend a retention of the athletic provisions of the regulations and a recognition of the need for flexibility in determining now to provide equal opportunity in this area.

I would like to conclude by summarizing the three things I have attempted to do in the last few months. I have tried to delineate, outline several problem areas which we observed with respect to the current regulations. I have tried to also say that we do not feel that these are insurmountable or unmanageable.

I ask and urge you not to take any actions that would prevent the implementation or the effective date of these regulations as of July 21, 1975.

Thank you.

Mr. O'HARA. Thank you very much for your testimony, Dr. Varner.

I would like to address myself for a moment to the question of the emphasis on athletic activity. The emphasis on athletic activity is not the chairman's emphasis. In my mind, that is fairly far down the list of issues in the title IX regulations.

So the way we conduct the hearings is, we have asked educational associations of different kinds that may wish to be a witness and appear, such as the association in behalf of which you are appearing.

The difference in this case is that we had something occur that does not usually occur. The organizations on behalf of which you are appearing appear before us every time we have something on education. The National Association of Collegiate Athletics, the Association of Football Coaches, the football coaches very seldom have to appear and they did ask to appear on this one and their concern is primarily in that area.

That I think resulted in terms of publicity at least, because the papers were more interested in that aspect of it than in other aspects of attempting to focus it on athletics.

My own personal view is it is not the main issue in the regulations and I just wanted to make it clear, that it is not my intent that it was given that kind of focus. As a matter of fact, I am very unhappy over the focus because it tends to muddle the other issues. Having everybody walk up here and testify about athletics and ignore, many of them, some of the issues we agree are more important.

I want to congratulate you on your statement because you do get into other issues. I think you do so quite well.

You have mentioned two of the areas of concern, the requirement for self-evaluation in this action, in the regulations, and there is a requirement for self-evaluation and a requirement for grievance procedures in the regulations.

Now, you point out in your testimony some of the problems associated with that. For instance, you point out that the self-evaluation thing is, in your opinion, an essential first step and that you speak here of other statutes and Executive orders in which people are urged and encouraged to operate self-evaluation. I recognize that.

But I don't see where the authority to require an institution to conduct a self-evaluation program comes from. I have read and reread title IX and I don't see anything there that it would seem to me justifies a regulation that requires an institution to conduct a self-evaluation program. There may be ones that they probably ought to have, I think you make an excellent argument that they ought to have some, just like a grievance procedure.

I think any institution that has its head screwed on tight is going to figure out that it ought to have grievance procedures.

But I don't see anything in the statute that requires them to have a grievance procedure. I don't see that it is the responsibility of the Department of Health, Education, and Welfare to say, "Well, probably the Congress, if they thought of it they would have required it, so we will require it."

There are all kinds of people running around this town, not as many, fortunately, as there were a year ago, who think it is up to them to decide what the law ought to be, rather than the Congress or the people charged with that responsibility. That is the part that troubles me.

I am for a grievance procedure and I am for self-assessment practices. If somebody were to propose such an amendment to the statute to me, I would think very seriously about it. But that was not indicated, that kind of concern.

Now, about the athletics thing, I think it is a very complex and difficult problem and I think the real problem is that the one thing that the people on the two sides of that issue have in common is their distrust of the people that will be admitted under title IX regulations, because the coaches and that crowd, they feel the title IX regulation will be administered in such a way as to destroy their program and some of the women groups feel the title IX programs will be administered in such a way that they will have no practical impact on the discrimination that exists and I want both of those groups to understand I share their difficulty and I think Congress ought to try to clarify just what it wants in view of the athletic situation, try to nail it down. I think we were remiss in not doing it.

Thank you very much.

I hope that you want me to vote on the veto override.

We have the House bill that the President vetoed coming up shortly for a vote and he vetoed it and we will try to override it today.

Thank you very much.

Ms. VARNER. Thank you.

Mr. O'HARA. The Chair will announce that tomorrow morning. Mr. Weinberger will appear at 8:30.

[Whereupon, at 12:35 p.m., the committee recessed, to reconvene at 8:30 a.m., Thursday, June 26, 1975.]

SEX DISCRIMINATION REGULATIONS

THURSDAY, JUNE 26, 1975

House of Representatives,
Subcommittee on Postsecondary Education
of the Committee on Education and Labor,
Washington, D.C.

The subcommittee met, pursuant to recess, at 8:30 a.m. in room 2175, Rayburn House Office Building, Hon. Paul Simon presiding.

Members present: Representatives O'Hara, Benitez, Blouin, Simon, Mottl, Hall, Quie, Eshleman, Buchanan, and Smith.

Mr. Simon. The subcommittee meeting will come to order. I will take the Chair temporarily to hear the distinguished Congressman from Louisiana.

STATEMENT OF HON. JOE D. WAGGONNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

Mr. Waggonner. Thank you, Mr. Chairman and gentlemen of the committee. I don't suppose, inasmuch as none of the ladies of the committee are here, that I will be taken to task by saying just gentlemen of the committee. I won't be discriminating in addressing you in such a way this morning.

I would like, by and large, this morning, Mr. Chairman, to speak to you in a very informal and impromptu way without much in the way of a prepared statement.

I am aware of the fact that yesterday what I considered to be some very good testimony was presented to the subcommittee with regard to title IX regulations by Janet L. Kuhn. This particular witness documented, as I view it, in a very good way, the excesses of the regulations as contrasted to the law. She did point out, at least to my satisfaction—and I recognize there are others who would disagree—that these proposed regulations do exceed the intent of the Congress and are contrary to the law.

There isn't anything unusual about the regulations, Mr. Chairman, exceeding the intent of the law. I have not been here as long as some others but, in the eight terms I have as a Member of the House of Representatives, I have seen the years of turbulence wherein the Congress has been called upon to act in a number of areas where there was alleged discrimination of one sort or another and where there has been some actual discrimination. I would be the last to deny that.

But it has been my experience that the bureaucracy has adopted very much the philosophy of the Egyptians in building the pyramids: If they can get everyone to moving in exactly the same direction, then there is no force this side of heaven which will stop the momentum they have gained.

From my point of view, even though I am quick and willing to admit the public doesn't in all instances agree—the general public feels that the Congress is the greatest enemy they have, but I think they have more difficulty with the bureaucracy than they do with the Congress itself.

Nevertheless, in these areas of alleged and actual discrimination, about all that the Congress ever said with regard to trying to do something about preventing discrimination was that "You will not discriminate"—"Thou shalt not discriminate." This is about as far as the Congress has ever gone.

But, in attempting to make discrimination illegal in a number of areas with regard to race, color, creed, sex, religion, national origin, whatever you might want to consider for the moment, the executive branch of the Government, in every instance, at one time or another, exceeded the intent of the Congress.

The perfect example is that which has come along in recent years on the part of the executive branch of Government to require affirmative action by whomever it is that is involved, to try to give assurance or to try to be sure that there is compliance.

I am not aware of a single statute that the Congress has passed which really mandates affirmative action. Now, the executive branch of Government has, in requiring affirmative action, required those involved to prepare something in the way of an affirmative action plan; and, in the preparation of this affirmative action plan, they have been deemed unacceptable and not worthwhile if they don't prepare the machinery for several other phases of operation involving their actions.

I am not a lawyer, but we always presumed in this country that anybody was innocent until he was proven guilty, but the executive branch of Government has assumed another posture in direct contrast to that well-accepted principle. They just presume that you are guilty until you prove yourself innocent.

I have had members of the bureaucracy from HEW, from the Office of Education, just say bluntly—and I am not saying that all of these people purposely try to circumvent the law—but I have had these people say: "Look, this is what we say the law is. If you don't like it, you prove otherwise."

Well, nobody has the resources to fight the Federal Government. The bureaucracy is too big. But, in requiring the presentation and implementation of affirmative action plans, the bureaucracy says: "As part of that plan, you are going to have to provide a procedure for those who are involved and who have complaints to appeal to have their case properly presented and their point of view made known." In addition, they require monitoring procedures.

All of these things do nothing in the world except tie the people involved in knots. They never know what they can depend upon. There was a day, for example, say, that the bureaucracy said, with regard to race: "It is illegal for you, in keeping records that we might monitor, to identitfy anyone by race." Of course, no law ever said you couldn't do this, but they changed their position somewhere down the line.

In the instance of discrimination by sex, you are concerned with the education amendments of 1972 and the implementation of the regulations.

I think it is incumbent upon this committee—and I commend this committee for holding these hearings—to make a determination as to whether or not the Executive is complying with congressional intent—Congress should do more of this. And I would suggest to you, as long as there is anything in the way of reasonable doubt, that you invoke the principle of law again and not accept these regulations.

There are several aspects of it. I have here in my hand something that I think you ought to be interested in—and I am sure most of you noticed it—an article from the Washington Post, Wednesday, June 25, page A–31, having to do with college hiring and the ruling of the Executive being relaxed. Now, if this instance of college hiring and this Executive rule does not demonstrate the arbitrary authority of the Executive, I don't know what does.

The second paragraph carries a statement of the Secretary, who, I understand will be here later this morning, and who is a friend of mine. The story says:

> At the same time, Caspar W. Weinberger, Secretary of Health, Education, and Welfare, said, in a telephone interview, that he has no doubt that very substantial revisions are needed in affirmative action regulations as applied to universities and colleges. He suggested the extensive data-gathering now required at schools as the chief area needing reform.

With that admission on the part of the Secretary of Health, Education, and Welfare, is it not equally right to assume that years after there is implementation of whatever finding he has provided in the way of regulations for title IX of the education amendments, there will still be question?

My point to you is: If they are still arguing about what those regulations ought to be and there is still sharp disagreement with regard to those disagreements all of these years later, you can bet your bottom dollar that there are going to be continued disagreements with the implementation of these regulations and they are going to be everchanging.

They don't have a fixed position. They seem to assume the posture of the Wizard of Ooze; they just change positions as they need to fit whatever the circumstances might be. And, if any of you believe that there is not discrimination from one area of this country to another, from one university to another, you are kidding yourselves. These people have an awful lot in the way of arbitrary authority and they change positions as the need arises.

I daresay if the majority of these schools—and I make no bones about it—had been down South, there wouldn't be a relaxation of the ruling at this point in time. I think this speaks for itself.

Here is another story from this morning's Washington Post, Thursday, June 26, page 84, headlined, "Housing ads called sexually biased." Going back to the open housing legislation of 1968—and there have been amendments—the Department of Justice, their Civil Rights Compliance Division, has issued a new order to the newspapers saying that they can't carry an ad advertising a room for rent in a private home wherein they specify that it is available to one sex or the other.

The attorney for the Washington Post says they don't think private homes are covered. You may read the article and I will submit both of these for the record.

[The article referred to follows:]

[From the Washington Post, June 26, 1975]

Housing Ads Called Sexually Biased

(By Cynthia Gorney)

Washington Post Staff Writer

The Justice Department yesterday told nearly 100 daily newspapers, including The Washington Post, that they were printing sexually discriminatory housing advertisements.

In a letter to members of the American Newspaper Publishers Association, an organization that includes some of the nation's largest metropolitan dailies, Assistant Attorney General J. Stanley Pottinger said that classified advertisements for housing that specify a preference for one sex or the other are in violation of the 1968 Fair Housing Act.

Copies of the letter were sent to newspapers with circulations of over 100,000 that were thought to be in violation of the law, a Justice Department spokesman said. The list included The Washington Post, The New York Times, the Miami Herald, and the St. Louis Post-Dispatch.

The letter said, "It has recently come to our attention that your newspaper, as well as many others, prints classified advertisements, primarily for the rental of dwellings, which indicate a preference for limitation to tenants of one sex or the other."

Such advertising has been illegal since last August, when the Fair Housing Act — originally enacted to prohibit racial discrimination in housing — was amended to include prohibition against sexual discriminaton.

The statute does not cover advertisements for roommates, Pottinger said. But it does bar newspapers from publishing discriminatory ads for furnished rooms.

"This letter was directed only at papers, not at landlords," a Justice Department spokesman said. "A little old lady with a furnished room can rent to anybody she wants, but we're asking the papers to comply with the law."

Thomas R. McCartin, vice president-sales for The Washington Post, said that in the past the paper has allowed private landlords to specify sex when advertising furnished rooms.

"I still have in mind a doubt that this applies to personal homes," McCartin said. "But if it is a ruling and the law, it's quite obvious that The Post will review and conform its existing policies."

The Justice Department letter asked newspapers to comply voluntarily with the law. If they fail to do so, the department spokesman said, "We have to make a decision as to whether to bring action."

The courts have ruled that newspapers may not print sexually discriminatory ads for either housing or employment, Pottinger said, and that such regulation is consistent with the First Amendment.

Mr. Waggonner. But, nevertheless, the Civil Rights Compliance Division now says that they can't carry such ads. If they do, they are going to be prosecuted—under what law, I don't know.

But I am attempting to show you that no matter how much time elapses between the cup and the lip, no matter what congressional intent is, the bureaucracy changes position as the evershifting sands, over and over again.

But are we overregulated? This week's U.S. News & World Report gives at least feel for the extent of regulation and overregulation, the cover sheet says: "The regulators that cost you $130 billion a year." And they are talking just about the regulatory agencies. They are not talking about the regulations provided in such areas as HEW and the Department of Justice. Those costs would be added to the figure of $130 billion a year which the U.S. News & World Report expresses.

A number of you here on this particular committee were quite active during enactment of these amendments in 1972. I was here. I participated rather extensively myself in those debates. A number of questions were raised and, Mr. Chairman, I would ask, rather than indulge you for this time, that this brief statement be included in the record.

Mr. O'HARA. Without objection it is so ordered.

[The prepared statement referred to follows:]

PREPARED STATEMENT OF HON. JOE D. WAGGONNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA

It is with the utmost urgency and concern that I appear before you today to strongly urge you to vote to return to HEW these regulations implementing Title IX of the Education Amendments of 1972. They clearly do not reflect the intent of Congress.

As you know, the title is a very broad one, covering many aspects of college and university life in this country; and I find many objectionable features which circumvent the real purpose behind the passage of such legislation.

Some of these have been, or will be, discussed during these hearings in far greater detail by others who have greater expertise in their fields. For instance, I believe the athletic officials in many of our finest institutions of higher learning have expressed very valid arguments to support the fact that Congress did not intend to have these regulations go so far as to literally end major athletic programs as we know them today.

The problem I see in this and many other sections, such as the recruitment and admission sections, boils down to one very serious point; and, that is, the fact that these regulations leave too much room for arbitrary interpretations on the part of bureaucratic officials who have no regard whatsoever, in my opinion, for the real intent of Congress, or, for that matter, the majority of the people of this country. To them the end justifies the means.

If the Federal Government is to be involved at all in any aspect of education, the Congress must set clear limits for these bureaucrats to observe in implementing the law. I believe that the limits set originally by Congress in Title IX are far clearer than set forth in these regulations.

One area covered by Title IX, in which I feel I have some expertise with regard to the intent of Congress, is the area which covers campus organizations. As some of you know, I have actively fought to obtain a clear "hands-off" policy by the Federal Government in the area of certain campus organizations, and Congress has supported this approach for many years.

Section 804(b) of the Higher Education Act of 1965, which I authored, states:

> Nothing contained in this Act or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institution.

The intent of Congress was further clarified in an exchange on the Floor I had with the then Chairman of the House Education and Labor Committee, Adam Clayton Powell. He clearly supported this exemption; yet there are still those at HEW who fail to recognize this.

Further clarification of the exemption was set forth late last year in the Library Conference Bill; but it, too, failed to include the intended exemption for business and professional fraternities and sororities, honor societies, and other such organizations. So, HEW is trying again to regulate a situation they know full well is covered by Section 804(b).

All members of any community share the same rights of freedom of speech, peaceful assembly, and the right of petition. Being members of an academic community should not be reason for the Federal Government to curtail these rights nor the responsibilities involved with them. It was not the intent of Congress, in passing the Title IX Education Amendments of 1972, to force the professional, service, or honorary sororities and fraternities to give up their single sex status under the guise of equal opportunity for women.

Under Section 501 of the Internal Revenue Code of 1954, sororities and fraternities of various kinds are given tax-exempt status as private, non-profit organizations. These organizations do not receive Federal financial assistance of any kind; nor do they serve in the capacity as contractor or subcontractor to any educational institution.

When the Bayh Amendment to the White House Conference on Library and Information Services Bill passed in December 1974, the business, professional, and certain other campus organizations were not specifically exempted; so HEW officials have in these regulations singled them out for coverage under Title IX despite the very clear legislative history which I have just mentioned providing protection for *all* such organizations.

Our distinguished former Colleague, Edith Green, who was instrumental in the passage of Title IX, has often stated that it was not her intent to have the social and the professional groups treated differently in implementation of the regulations. When the conference report was called up on the White House Conference on Library and Information Services Bill, Mrs. Green, among others, felt that the language of the Bayh Amendment would establish an undesirable precedent in making a separation between social and professional or service fraternities.

The problem was whether to accept the language which was not all-inclusive in order to immediately clarify exemptions for the organizations covered in the Bayh Amendment, or whether to delete the amendment altogether so that an attempt could be made to insure that the amendment would be more inclusive at a later time.

The Floor discussion centered around whether the adoption of the proposed Bayh language would make it more difficult in the future to pass a resolution rejecting the HEW regulations on the basis that they are inconsistent with the law. Your distinguished Chairman, Mr. Perkins, differed with Mrs. Green on that point, stating that a resolution could be brought to the Floor "on any subject—to change any law". He made a plea to accept the language as it stood in order to clarify exemptions for the organizations listed in the Bayh Amendment, which in the end was agreed to.

Our Colleague, Mr. Quie of Minnesota, pointed out that the conferees were not able to address themselves to the overall issues and problems presented in Title IX and that the conferees had to work within the scope of the Bayh Amendment. Chairman Perkins stated also that to have dealt with service and professional fraternities would have been beyond the scope of the conference.

So, to clarify the specific exemptions which Senator Bayh desired and which were the Senator's interpretation of Title IX application, the amendment was passed and is now included in P.L. 93–568. The Civil Rights Office of HEW, which has enforcement power for Title IX, has been determined that the regulations will affect those non-social single sex organizations which are receiving "significant assistance" from a higher education institution receiving Federal funds.

The problem, which relates back to my comments about a common-sense approach, is that the Civil Rights Office of HEW has consistently refused to clearly and specifically define the term "substantial assistance" for the groups across the country who will be affected by their regulations and for the many Members of Congress who have asked them to do so.

For example, the professional fraternities and sororities *occasionally* use a xerox machine, need secretarial assistance, post notice of chapter meetings on the school bulletin board, meet in a classroom after hours, and have a faculty advisor. In some instances the chapter house is located on campus; however, on 75% of the campuses, the chapter house is located off campus. Other groups on campus, of course, also share these small services. It cannot at this point be determined if HEW will choose to define this as "significant" and "substantial" assistance.

I was told by letter of August 9, 1974, by Peter Holmes, Director of HEW's Office for Civil Rights, that "occasional use of copying machines, secretarial assistance or similar services does not constitute the type of support necessary to take an organization out of the scope of protection offered by Section 804(b)". However, experience has shown that so many bureaucrats are involved with the enforcement of these regulations that almost any kind of interpretation can surface and the monitoring of bureaucratic abuses is a virtual impossibility.

Action to change the character and membership of professional fraternities and sororities can be only peripheral in its effect upon higher education leading to careers. The most important equal opportunity issues are those affecting the employment, compensation, promotion, and upward mobility of women employees, and the fair treatment of women students in respect to admission standards, financial aid, counseling, and other aspects of the educational process. Forced sex integration will not insure that women will be treated equally nor will it serve to provide women the basis to overcome the effects of negative conditioning and prepare them to assume professional responsibility.

I, therefore, again strongly urge you to recommend to the House that these regulations be returned to HEW for failing to abide by the intent of Congress.

Mr. **Waggonner.** There are two or three comments I want to make. We called to attention—Mr. Green did, Mr. Quie did, and Mr. Perkins responded—the fact that if we exempted certain organizations by name, then the inference might be that it was intended that only these organizations be exempted.

Mr. Perkins said on that occasion that it was beyond the scope of a conference to go any further and he urged that we accept them, that it would be without prejudice if this was adopted.

But it was not without prejudice, because now the executive comes back and assumes the position that "Inasmuch as you have designated these as exceptions, we now presume that all of those others not specifically exempted are to be included in the provisions of the law." That is a sharp departure from the intent of Congress. The debates themselves reflect exactly that.

There is another occasion, which I will cover here, and I want to be sure that I cover this. You will remember in 1965, when we acted on the Higher Education Act, I offered an amendment to section 804(b), and I want to quote it to you:

> Nothing contained in this act or any other act shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization and institution of higher education, other than a service academy or Coast Guard academy, which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institution.

The intent of Congress was further clarified in an exchange then on the floor, an exchange I had with the then chairman of the House Education and Labor Committee, Adam Clayton Powell. He clearly supported this exemption. Yet, there are still today those at HEW who fail to recognize this.

HEW, at periodic intervals—I suppose every time a new employee comes on board or a department head changes, or a new Assistant Secretary comes along in certain areas—they send their people out to the campuses, they utilize the mails, and they are continually telling these people that they must comply with some doctrine that HEW holds, some attitude that prevails personally with them, totally contrary to the law, totally outside of the law.

I hear at regular intervals—and I have a file this high from colleges and universities who have been threatened with the cutoff of funds—if they don't break down the barriers with regard to sex and race with the fraternities and sororities, their private clubs, whether or not they are totally private, whether or not there is support from the institution. HEW just assumes that attitude and they just keep coming back. They are never satisfied.

I would suggest to you that this is going to be the attitude with regard to these amendments.

I have one or two other thoughts. Here is a fact sheet dated June 1975 from HEW which just generalizes with regard to their proposed regulations—their generalizations. They are generalizations, except that with regard to sex there are some differences.

For example, they say in the regulations, and they comment on it in this fact sheet, that in the instance of contact sports there will be nothing compulsory. That, of course, is just a recognition that is in compliance with the law. But they do mandate in the regulations, and comment on it in the fact sheet, that they do certain other things with regard to physical education. And they mandate that some of these classes be combined. This is a decision that ought to be left to the local people in the first place. They have experience and ability to do these things.

But I would suggest to you that if this mandate is allowed and these classes are combined, it is not going to be long that you are going to get complaints that there has been discrimination with regard to grades.

How you are going to judge 100-pound female, 125-pound female, in a weightlifting class in physical education on the same basis that you do a 225-pound strapping 16- or 21-year-old male, I simply don't know.

Mr. O'HARA. Or even a boy of the same weight.

Mr. WAGGONNER. Even boys of the same weight. There are just certain differences. You are going to have to face all of these questions.

And we are on the shifting sands again; they are even changing their position.

I would suggest to you that we examine the track record of the regulators in HEW and in Justice, and that you not allow the implementation of these regulations until you are as sure as you can reasonably be that they are completely in line with congressional intent. I suggest that you reject their proposed regulations because there are excesses in some of them and some of them are clearly beyond congressional intent.

I generalized, I know, Mr. Chairman. I want to thank you for the opportunity to appear early this morning so that I might make another appointment. But I would be happy to try to discuss anything specific that you might have. You and I have talked many, many times about the several aspects of this problem.

Mr. O'HARA. Mr. Waggonner, I want to think you for taking the time to come here. I think that you, as well as any Member of Congress, recognize the significance of what the Congress is trying to do here in terms of regaining control of its basic constitutional function, the making of the laws.

As you know and appreciate, there are only 535 Members of Congress but Washington is full of people who want to make laws. There are members of the executive and judicial branches of Government that do this and do so out of good motives, you know; they see where the Congress has failed to provide for this and they think and believe very deeply that it should have so provided. Or they think Congress did not go far enough here to be effective and they think maybe they can help the Congress out a little bit by reading into the law something that is not there.

They do so for the highest motives, but I just happen to believe that if our constitutional system is going to survive, some way has to be found so that the Congress writes the laws and nobody else.

I want to congratulate you for your perceptiveness and ability to recognize that the important issue that is at stake here is not the question of sex discrimination. I don't want to mix up the issues of sex discrimination and the power of the Congress to make the laws. I mean I think it gets two things mixed up that are going to confuse the issue. But I guess you have to take it on where you find it and it just so happens this way.

Mr. WAGGONNER. Mr. Chairman, if I might comment. I readily admit, there has been an attitude among some, even in the legislative branch of Government, to assume that as legislators the task of approving proposed regulations would be unconstitutional inasmuch as it would violate the separation of powers between the legislative and the executive.

I don't share that point of view. I consider it a matter of oversight. This is something that we have been negligent in, this matter of oversight, and it is time that we get on with it.

Mr. O'HARA. Mr. Waggonner, let me conclude by saying this. I think it is time we got on with it. I would hope that one of the things that this exercise is going to do—that section 431(d) is going to do—is to heighten the awareness of the Congress that there are solutions to this problem and it is not just the problem in the education legislation, as you well know, but that is the only thing 431(d) applies to.

Mr. WAGGONNER. This is going to affect education in this country.

Mr. O'HARA. Yes, but it is the problem in all areas, the problem of legislation writing gotten out of hand, and I am hoping we can heighten sensitivity and start thinking in terms of amendments to the Administrative Procedures Act.

Mr. WAGGONNER. There is not any question about that. We are heading, Mr. Chairman, in the direction of quotas—part of the justification suggested by those who support this, I mean. You are not going to satisfy anybody with this legislation. There are those who are going to appear before you who will say the regulations don't go far enough. Others will say they go too far. Both will be dissatisfied when the executive starts administering. You can feel sure of that. There is no doubt about it.

Mr. O'HARA. There is unanimity of the witnesses that they don't trust HEW to administer the law properly.

Mr. WAGGONNER. I hope this committee won't. And I hope you send the regulations back to HEW. But you have awakened or heightened a sensitivity at the university level of those academicians who like to rely upon their academic freedom. They are afraid to quote us down the turnpike and don't want any part of it. They are OK for somebody else, at least they have been in the years gone by, but now that the shoe is pinching their foot, they are concerned about it now.

I am glad they are concerned. They are completely right. I just regret the fact that it took them so long to wake up. In this instance, even though they are learned, they are slow learners.

Mr. O'HARA. Thank you very much. Mr. Eshleman.

Mr. ESHLEMAN. No questions.

Mr. O'HARA. Mr. Simon.

Mr. SIMON. Just one question. As I understand your comments, Mr. Chairman, neither of you suggest HEW is not within their power in drawing up the regulations but simply suggesting that in details they have gone, in some areas, too far, is that correct?

Mr. WAGGONNER. Mr. Simon, that is exactly correct. Whatever is done must be administered by HEW. I feel very sincerely that their proposed regulations do exceed the intent of the law in many instances, as has been documented for this committee. They do propose regulations which are beyond the law.

I am just urgently requesting that until you are completely sure, as reasonably sure as you can be, that what they propose is within the framework of the intent of Congress, we reject, through the provisions provided under the law, these proposed regulations that require that they be brought within congressional intent.

Mr. SIMON. Thank you. No further questions.

Mr. O'HARA. Mr. Hall.

Mr. HALL. I want to thank the gentleman for appearing. No questions.

Mr. O'HARA. Mr. Blouin.

Mr. BLOUIN. No questions.

Mr. O'HARA. Mr. Mottl.

Mr. MOTTL. I would like to compliment the gentleman for his fine testimony.

Mr. O'HARA. Mr. Hawkins.

Mr. HAWKINS. I apologize to my colleagues for not hearing him.

Mr. WAGGONNER. Mr. Hawkins and I are colleagues in more ways than one; he was born in the congressional district I am now privileged to represent and I took him home about a year ago for an affair down there and I think he rather enjoyed it. We were happy to have him, too.

Mr. HAWKINS. I was very delighted to be able to do so. I found out my colleague is very distinguished in his own newspapers, very unusual for any of us.

Mr. O'HARA. Mr. Benitez.

Mr. BENITEZ. Thank you, Mr. Chairman. I have one question, Mr. Waggonner. Can you identify any of the specific sections on this nondiscrimination requirement that are presently in the rules and regulations?

Mr. WAGGONNER. I have gone over them, Mr. Benitez. I have pointed out a statement earlier made by Janet L. Kuhn yesterday, and I don't have any disagreement. Last night I read her testimony and I would refer you to those.

Mr. BENITEZ. In your testimony you didn't cover any particular item?

Mr. WAGGONNER. No. You remember at the outset I said I would not work from a statement. I had read this and I would not deal with that area, but deal in a general way with what the track record of the regulators has been with regard to intent.

Mr. BENITEZ. Thank you. The reason I raised this issue is that I am sure you have also indicated it is the job of HEW to make regulations, they are charged specifically with these regulations, and we have heard testimony—I was not here yesterday but I have heard testimony of lots of people complaining that the regulations do not go far enough, and this is the first reference I have had to that point that they might be going further than justified.

Mr. WAGGONNER. Janet Kuhn made this point yesterday, and you will recall that I said, at least from my point of view, she made the point. Although I recognize that there are others who disagree with me, they are entitled to that disagreement. That is a good thing about this great land of ours. But just as it is required of HEW that they propose these regulations, it is required of us that we assure congressional intent.

Mr. Benitez. Thank you.

Mr. O'Hara. Mr. Quie.

Mr. Quie. Mr. Chairman, one of the problems that minorities and women face is that they are not noticed. We have the same thing here on the minority side, because, Mr. Chairman, the rules provide that you alternate back and forth.

Mr. O'Hara. I am sorry.

Mr. Quie. And you went all the way through the majority side. This is what women and minorities find in schools which is the reason we have title IX up here.

Mr. O'Hara. We had better get title X.

Mr. Quie. Yes, title X.

Mr. Waggonner, I appreciate that you came here and testified. In the years I have been in Congress, you have watched and are aware of, not only the laws that happen back home but the handling of civil rights laws and regulations by HEW and the Department of Labor and the Justice Department. To me, you are the greatest expert in the Congress in this area.

Now, we all don't agree all of the time but I have tremendous respect for people who have that capability which you have of ferreting out what is really wrong with the legislation and then trying to make certain we follow the law. I have observed you always wanting to follow the law even though the law might be one that you voted against.

For that reason, I think our committee benefits from the testimony that you have given here. If we had followed your advice through the years, I think many of the problems that we are confronted with now in areas of implementing these laws would have been prevented. Thank you.

Mr. Waggonner. Thank you, Mr. Quie. Not to open an old wound but, by any stretch of the imagination, it does not make any difference to me, after a law becomes law, whether or not I agree with it. It is my responsibility to see to it that there is compliance with the law and that whoever has anything coming under the provisions of that law gets whatever it is that law provides for them. It is up to me to make it work.

That is the chief purpose of my being here this morning—let's make it work. Let's not make education a greater problem than it already is by overburdening it with superfluous regulations.

Mr. Quie. Thank you.

Mr. O'Hara. Mr. Buchanan.

Mr. Buchanan. Thank you, Mr. Chairman. I want to associate myself with the gentleman from Minnesota pertaining to your expertise and the service you rendered to the committee by being here. I will say to our colleague all of us have learned to deeply admire the gentleman from Louisiana.

I would simply ask, pertaining to the deeper problem involved here of overregulation, to which you earlier referred: Do you feel that part of the problem is that we don't legislate fully and specifically enough in the first place and thereby give too much room to the bureaucracy to do most of the legislation?

Mr. Waggonner. Mr. Buchanan, there are times when we act in haste, but we have come to consider everything a crisis, a matter of urgency, and that is of our own doing. I don't know anybody to criticize except ourselves for that shortcoming, and we are guilty of it.

Mr. BUCHANAN. It would seem to me that we are going to have to assert more and assume more responsibility to spell out the law to avoid the kind of problem of too much leeway taken by the bureaucracy.

Mr. WAGGONNER. Senator Mansfield, you will recall, 3 or 4 years ago was quoted widely as saying Congress had enacted enough legislation for a while; it would be much better if the Congress concerned itself with perfecting and making that legislation which had recently been enacted workable, rather than just forgetting it and going on to other areas, and making the same mistakes again.

You never help yourself when you pile one mistake on top of another.

Mr. BUCHANAN. I thank the gentleman.

Mr. O'HARA. Thank you very much, Mr. Waggonner, for appearing this morning.

Mr. WAGGONNER. Thank you, Mr. Chairman.

Mr. O'HARA. The Chair will declare a 2-minute recess. Mr. Weinberger is on his way and he will be here in just a couple of minutes.

[Whereupon, a brief recess was taken.]

Mr. O'HARA. The subcommittee will come to order.

The next witness will be the Honorable Caspar Weinberger, Secretary, Department of Health, Education, and Welfare. Mr. Weinberger is accompanied by a number of others he may wish to identify for the record.

Mr. Weinberger, we will be happy to hear from you.

STATEMENT OF CASPAR W. WEINBERGER, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, ACCOMPANIED BY PETER E. HOLMES, DIRECTOR, OFFICE FOR CIVIL RIGHTS, DHEW; JOHN B. RHINELANDER, GENERAL COUNSEL, DHEW; STEPHEN KURZMAN, ASSISTANT SECRETARY FOR LEGISLATION, DHEW; MS. GWEN GREGORY, OFFICE FOR CIVIL RIGHTS; MS. ALEXANDRA BUEK, OFFICE OF THE GENERAL COUNSEL

Secretary WEINBERGER. Thank you very much, Mr. Chairman, and members of the committee. I am accompanied by Stephen Kurzman, Assistant Secretary for Legislation; Peter Holmes, Director of the Office for Civil Rights and John Rhinelander, general counsel of the Department; Ms. Gwen Gregory from the Office for Civil Rights and Ms. Alexandra Buek from the Office of the General Counsel.

That is the group that is here, and the reason I am accompanied by all of these people is that we want very much to answer all of your questions in the detail we assume you want them answered.

I have a short, comparatively short, statement I will be glad to present to the committee now.

Mr. O'HARA. Please do so.

Secretary WEINBERGER. We do appreciate the opportunity to discuss with you our final regulation to implement title IX of the Education Amendments of 1972. This is the first major sex discrimination legislation enacted by Congress which affects educational institutions.

Our Department's regulation to effectuate this statute is comprehensive as well as specific, and we have done that for two reasons. First, the legislation itself prescribed, with certain explicit exceptions, that no person shall be subjected to discrimination on the basis of sex in federally assisted education programs or activities, thus potentially covering discrimination against a student in his or her entire school career from preschool through graduation or professional school, and covering discrimination against that student's teachers and against any other employee of the schools which that child attends.

Second, the Department felt that we should cover the various major policy issues we saw evolving from the 37-word prohibitory language of the statute, to give notice to educational institutions of their specific obligations and to avoid future individual ad hoc decisions for each institution on these major policy questions.

The drafting process I would like to outline in a little detail, because I think it is important for everyone to realize the lengths to which we went to try to cover all of the situations and the numbers of people with whom we conferred on a continuing basis. We conferred in that manner with representatives of the educational community. In addition, more than 50 national organizations representing professional associations, school officials, student groups, athletic associations, and educational media were invited to attend general discussion sessions which the Department held on August 2-4, 1972, to get everyone's ideas.

During this period, the Department also participated in conferences separately sponsored by national organizations representing educational institutions, school districts, women's groups, athletic directors and coaches, student personnel officers, student counselors, student financial aid officers. I personally met with representatives of the NCAA, the AIAW, numerous women's groups, and institutional representatives before the publication of the final regulation.

Our General Counsel made a legal determination on each major issue raised in the drafting process as to which alternative policies were legally supportable and as to which subjects, such as athletics, had to be covered and we followed his legal advice. We also consulted the Department of Justice and followed their advice.

In many cases, the Department did not have discretion to make the decisions requested by interested parties. However, in those areas where there was room for policy discretion, the Department undertook special efforts to encourage broad public interest and comment and, wherever possible, to accommodate the various points of view.

On June 20, 1974, the proposed regulation was published. The comment period was purposely extended until October 15, 1974, to permit school administrators and students ample time in which to formulate comments. The extended comment period was also designed to enable school administrators to evaluate their practices during part of an actual school term in order that their comments might be based on such evaluations. Even those comments submitted after the October 15 deadline were considered.

During the summer of 1974, immediately following publication of the proposed regulation, the Department held a series of briefings on title IX and the proposed regulation, to inform individuals, organizations, and the local press as to the substance of the proposed regulation and to encourage broad public interest and comment. The briefings were held in 12 cities across the country. More than 3,500 individuals attended the briefings, and the press briefings were covered by 150 members of the media resulting in newspaper coverage alone of 175 articles and editorials; so a major effort was made to inform as many people as possible.

We received about 10,000 comments on the proposed regulation from virtually every major institution of higher education, hundreds of school superintendents, chief State school officers and principals, and women's groups. Each comment was reviewed and cross-indexed by a special task force, which later prepared policy option papers setting forth policy alternatives. All comments were made available for public review.

Review of the comments which the Department received on the regulation proposed in June 1974, resulted in inclusion of substantial revisions in the final regulation. Modifications that can be classified as "major" were made in 30 of the regulation's 61 sections. In addition, numerous perfecting and technical changes were made which frequently incorporated text contained in public comments. The President approved the final version as required by the statute.

The final regulation in all cases covers those matters we were advised the Congress included. We excluded from coverage all situations excluded by the Congress.

The regulation, briefly, provides as follows: Except for certain limited exemptions, the final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of these programs. If the Congress wished to exclude athletics, for example, as so many people seem to wish, Congress could easily have said so. However, Congress, in a 1974 amendment, the so-called Javits amendment, at section 844 of the Education Amendments of 1974, made very clear that athletics should be covered by the regulation. That had been our position based on title IX as originally passed because of its similarity of title VI, and Congress simply made this explicit with the so-called Javits amendment.

With respect to admissions to educational institutions, the final regulation, following the statute, applies only to: vocational, professional, and graduate schools, and to institutions of public undergraduate education (except those few public undergraduate schools which have been traditionally and continually single sex).

Military institutions at both the secondary and higher education level are entirely exempt from coverage under title IX. Practices in schools run by religious organizations also are exempt to the extent that compliance would be inconsistent with religious tenets. Thus, for example, if a religious tenet relates only to employment, the institution would still be prohibited from discrimination against students.

The final regulation covers recruitment as well as all admissions policies and practices of those recipients not exempt as to admissions. It includes specific prohibitions of sex discrimination through separate ranking of applicants, application of sex-based quotas, administration of sex-biased tests or selection criteria, and granting of preference to applicants based on their attendance at particular institutions if the preference results in sex discrimination.

Although some schools are exempt from title IX with regard to admissions, all schools (except military schools and some religious schools) must treat their admitted students without discrimination on the basis of sex. Specifically, the treatment sections of the regulations, following the statute, cover these areas: (1) access to and participation in course offerings and extracurricular activities, including campus organizations and competitive athletics; (2) eligibility for and receipt or enjoyment of benefits, services, and financial aid; (3) use of facilities, and comparability of, availability of, and rules concerning housing (except that, as approved in the statute, single-sex housing is permissible). For example, classes in health education, if offered, may not be conducted separately on the basis of sex, but the final regulation allows separate sessions for boys and girls at the elementary and secondary levels during times when the materials and discussion deal exclusivly with human sexuality. There is, of course, nothing in the law or the final regulation requiring schools to conduct sex education classes. This is a matter for local determination.

PHYSICAL EDUCATION

While generally prohibiting sex segregated physical education as well as other classes, the final regulations do allow separation by sex in physical education classes during competition in contact sports. Schools must comply fully with the regulation with respect to physical education as soon as possible. Elementary schools are allowed an adjustment period of up to 1 year, and secondary and postsecondary schools up to 3 years. During these periods, while making necessary adjustments, any physical education classes or activities which are separate must be comparable for each sex.

With regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them. Let's look first at what the regulation does not require because there seems to be a substantial misunderstanding about that.

(1) It does not require equal aggregate expenditures for members of each sex or for male and female teams; (2) it does not require two separate equal facilities for every (or any) sport; (3) it does not require women to play football with men; (4) it will not result in the dissolution of athletics programs for men; (5) it does not require equal moneys for athletic scholarships; (6) it does not require coeducational showers, locker rooms and toilet facilities; (7) it does not mean the National Collegiate Athletic Association (NCAA) will be dissolved and will have to fire all of its highly vocal staff.

The goal of the final regulation in the area of athletics is to secure equal opportunity for men and women while allowing schools and colleges flexibility in determining how best to provide such opportunity.

Where selection for a team is based on competitive skill, or the activity involved is a sport involving physical contact among players, then the college can provide separate teams for males and females or, if they wish, they can have a single team open to both sexes. If separate teams are offered, a recipient institution may not discriminate, on the basis of sex, in providing necessary equipment or supplies, or in any other way. I emphasize again that equal aggregate expenditures are not required. In determining whether equal opportunities are available, such factors as the following, among others, will be considered: whether the available sports reflect the interests and abilities of both sexes (and that obviously involves learning about those interests in one way or another); provision of supplies and equipment; game and practice schedules; travel and per diem allowances, et cetera.

Where a team in a noncontact sport, the membership of which is based on skill, is offered for members of one sex and not for members of the other sex, and athletic opportunities for the sex for whom no team is available have previously been limited, individuals of that sex must be allowed to compete for the team offered. However, this provision does not alter the responsibility which a college has with regard to the provision of equal opportunity.

In the case of athletics, like physical education, elementary schools will have up to a year from the effective date of the regulations to comply, and secondary and postsecondary schools will have up to 3 years.

Generally, a college may not, in connection with its education program or activity, provide significant assistance to any other organization, agency or person which discriminates on the basis of sex. The final regulation incorporates a Congressional exemption for the membership practices of social fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Campfire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth service organizations. That is as a result of a specific amendment to title IX passed by the Congress.

However, recipients continue to be prohibited from providing significant assistance to professional or honorary fraternal organizations, as opposed to social fraternities and sororities, because of the close relationship between such professional organizations and the educational and professional goals of students.

Generally, a recipient subject to the regulation is prohibited from discrimination in making available, in connection with its educatonal program or activity, any benefits, services, or financial aid, although "pooling" of certain sex-restrictive scholarships is permitted. Benefits and services include medical and insurance policies and services for students, counseling, and assistance in obtaining employment. Financial aid includes scholarships, loans, grants-in-aid, and work-study programs.

Generally, all facilities and housing services and rules must be available without discrimination on the basis of sex. As provided in the statute, however, the regulation permits separate housing based on sex as well as separate locker rooms, toilets, and showers.

The final regulation includes a provision which states that "nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials." As noted in the preamble to the final regulation, the Department recognizes that sex stereotyping in curricula is a serious matter, but notes that the imposition of restrictions in this area would inevitably thrust the Deparment into the role of Federal censor over all materials in school textbooks and curricula throughout the country and that is not a role we want or think is appropriate, or even constitutional.

All employees in all institutions are covered, both full- and part-time, except those in military schools, and in religious schools to the extent compliance would be inconsistent with the controlling religious tenets. Employment coverage under the proposed regulation generally follows the policies of the Equal Employment Opportunity Commission and the Department of Labor's Office of Federal Contract Compliance. Specifically, the proposal covers matters such as employment criteria, recruitment, compensation, job classification and structure, fringe benefits, and others.

With regard to the provisions of section 431(d) of the General Education Provisions Act, which calls for congressional review and possible veto of administrative and regulatory decisions of this Department, I must reiterate the constitutional objections we expressed in my letters of June 3 to the Speaker of the House and the President of the Senate.

We continue to believe that this provision raises substantial constitutional questions. In addition, the mere expression of congressional dissatisfaction, without specific amendatory language, would leave educational institutions throughout the country in the unfortunate position of being told by title IX not to discriminate but left with no regulation defining that discrimination. Educational institutions should not be left in the dark any longer.

I should note that the only point of agreement evidenced in all the comments on the proposed regulation was that "whatever the substance of our obligations, at least please tell us specifically what they are." If the Congress determines that a different course from that set forth in the regulation is warranted, then we believe it should proceed by way of amendatory or clarifying legislation, rather than by concurrent resolution aimed at deferring the effectiveness of a particular provision of the rules or indeed the statute. This would avoid the constitutional and any further questions as to specific reasons for disapproval or the intent of Congress, and would leave the educational institutions not in the dark but with the knowledge of what the law actually was.

The language of the statute is general, providing no specific guidance as to congressional intent. It has been extraordinarily difficult, first, to interpret the intent of Congress and, second, to accommodate the concerns of a wide diversity of interest groups and individuals. We have sought, and received, a substantial amount of public input into this regulation. It is unlikely, as a matter of fact, that the wide publicity and the hearings today would have occurred without the Department's attempt to gain the widest possible public input, rather than proceeding entirely on our own. It is, of course, impossible to please everyone, and, as I found out in the last few years, it is impossible to please anyone in these controversial fields, but I belive that we have reached a middle ground in the final regulation which allows the flexibility desired by institutions while protecting the interests of students and employees of these institutions.

Mr. Chairman, I would like to request permission to have inserted in the record at this point copies of editorial comment on title IX from across the country. They are not all favorable, but there is a wide range of support for the title IX regulations evidenced by the editorials and I think it testifies basically to the reasonable and, we believe, sensible approach we have set forth.

Mr. Chairman, we appreciated very much the opportunity to make this presentation. We may have other materials we would like to put into the record, but meanwhile we will be glad to try to answer any of your questions.

[The material submitted by Secretary Weinberger follows:]

[From the Philadelphia Evening Bulletin, June 13, 1975]

A BOOST FOR THE GIRLS

Many of the practices, if not the attitudes, which have long stymied women in their academic, professional and athletic endeavors in schools and colleges throughout the country will have to change if Congress adopts the anti-sex bias regulations recently issued by the Department of Health, Education and Welfare.

In spite of the controversy stirred by the proposed rules, especially those pertaining to athletics, the regulations are not unreasonable. What's more, they're overdue, coming three years after the passage of legislation barring sex discrimination.

While the provisions related to sports have attracted the lion's share of attention and criticism, the scope of the guidelines goes well beyond sports. They deal with admission and scholarship policies, counseling, hiring, promotions and salaries. They also would bring an end to the practice of all-male and all-female courses, such as shop and home economics have traditionally been.

In the areas of athletics, elementary and secondary schools would be required to conduct coed physical education classes, women would be permitted to participate in non-contact sports with men and women's athletic programs that have been shortchanged in terms of facilities, coaches and other resources would have to be upgraded.

Few of the objections to the provisions that pertain to sports are supported by fact or sound reasoning. The fuss about coed physical education classes, for example, is hard to fathom since the mingling is restricted to the gym or schoolyard—it stops far short of the lockerroom or showers.

The ominous warnings that the regulations will imperil male sports programs are questionable. There is little chance that the guidelines will affect the big-time programs—many of which rival professional operations—and some of the smaller ones are already in trouble because they're overextended.

One threat to the effectiveness of the guidelines is HEW's decision to concentrate its investigations on patterns of discrimination instead of individual complaints. While that approach may be more efficient, it is doubtful that it will insure compliance.

As debate over the guidelines continues, as it is certain to, the basic-issue involved—which is equal opportunity—must not be obscured by the age-old men vs. women arguments.

If it is true that education is a key to future success, then women should be able to participate in all facets of the educational experience. And if the law holds that equal opportunity applies to both sexes, which it does, the practices which stand in the way of women's equal opportunity, must be cast aside.

[From the New York Times, June 5, 1975]

AGAINST SEXIST SCHOOLS . . .

The new Federal guidelines against sex discrimination in the nation's schools and colleges combine a much-needed emphasis on equal opportunity for women with enough flexibility to prevent a dispiriting homogenization of educational institutions. Such a sensible approach to what is still an irrationally controversial area of social reform—and nowhere more explosively irrational than in sports—can be expected to draw fire from both ideological extremes.

Although some of the more esoteric aspects of sex discrimination are likely to attract most public attention, the crux of the matter is the prohibition of any bias blocking equal opportunity for female students and teachers at any educational level. Absolute equality is crucial in school and college admissions, financial aid, counseling and, in the case of teachers and other educational personnel, employment, pay and promotions.

The new rules quite properly prohibit the kind of sex stereotyping in education that barred girls from shop classes and boys from home economics. The justifications for such "male" or "female" subjects once put forth have long since been rendered obsolete.

The Department of Health, Education and Welfare has wisely resisted pressures to include the content of textbooks in its guidelines. Expert studies have provided ample illustrations that many of these teaching materials are indeed infected with male chauvinism, but Federal censorship is not the remedy. Local school boards and educators can better re-educate authors and publishers through care in selecting teaching materials.

In another constructive limitation of the general rules, the department sanctioned the continued existence of single-sex schools and colleges. Far from being an example of sexism, that exemption is an essential recognition of the importance of diversity in American education.

Far more vulnerable than any of the guidelines themselves, however, is the announcement that H.E.W. will no longer investigate individual complaints of discrimination. While some discretion is clearly in order to distinguish esoteric or crank complaints from legitimate grievances, any policy that ignores individual calls for justice can scarcely be considered law-enforcement. Secretary Weinberger cannot be faulted for appealing to the educational institutions' "good faith"; of deeply in- be naive to expect a total melting away of deeply ingrained habits of prejudice and exclusion in the absence of an effective mechanism for assessing well-documented individual complaints.

[From the Wall Street Journal, June 6, 1975]

Boys and Girls Together

The way things finally turned out there seems to be quite a bit of give in the sex-discrimination rules just laid down by the Department of Health, Education and Welfare. Saturday's heroes on the gridiron will still be mostly male, we would gather, and HEW gives assurances that suggest it doesn't really intend to demand sexual quotas for the Amarillo Armadillos.

But we are intrigued by the provision that elementary and high school physical education programs must be sexually "integrated." That doesn't mean coed shower rooms but it does seem to mean boys and girls together on the playing fields or the hardwood in integrated P.E. classes if not necessarily on the same teams.

Now it seems to us that it doesn't take a chauvinist pig to see a small problem here. We defy anyone to show that it is any less of a problem for girls, on whose behalf the rules were supposedly promulgated, than for boys.

The problem is simply that, whatever HEW says, boys and girls *are* different. Boys, by and large, can run faster, throw harder, jump higher and hit further than girls when they reach their more advanced stages of physical development.

The purpose of the rules is to protect the psyches of school children, an aim to which we subscribe. But on the playing fields it's going to be pretty obvious that all the above is true. And when that has been demonstrated, isn't it likely that a lot of school girls are going to be asking whether HEW has really struck a blow for their image of equality, or simply put them in a position where most have no need or desire to try to compete?

[From the Chicago Sun-Times Editorials, June 9, 1975]

Civil Rights on "Faith"

The Health, Education and Welfare Department was not convincing last week in trying to justify its intention to stop investigating individual bias complaints in favor of broader-based civil rights enforcement. Sec. Caspar W. Weinberger, rejecting the policy of "securing individual relief" for those with grievances, opted for "a methodical approach geared toward identifying and eliminating sexual discrimination."

That's not very reassuring to victims of discrimination who under the sex plan will have to wait for redress until HEW "identifies" a pattern that might fit their case. Even if "systemic" bias is forced, eliminating it won't be easy.

In announcing the Ford administration's new regulations to equalize opportunities for women in schools and colleges, Weinberger said they were written with the assumption of "good faith" on the part of 15,000 school systems and 2,700 colleges that must obey them. The plan to end individual investigations would cover all of these educational institutions, plus 30,000 health and social service programs.

If the secretary expects results by voluntary compliance and without effective means of dealing with individual grievances, he has a lot more "faith" in his new politics than we do.

[From the Washington Star, June 5, 1975]

EQUAL EDUCATION FOR WOMEN

Why all the fuss over HEW's rules barring sex discrimination in schools and colleges? If equality under the law means anything, it surely entitles females to an equal break in public-supported educational institutions.

The major complaints seem to be coming from spokesmen for male-oriented college sports who think the regulations promulgated by the Department of Health, Education and Welfare will end their high-powered, big-business programs. The fact is, sports are involved in only one part of the regulations. Other provisions require equal treatment for males and females in faculty hiring, financial aid, vocational training, housing, gym classes and other educational activities.

Women are only beginning to overcome the bias that has kept them out of the highest jobs in public school systems and colleges. Everyone knows that the big male bruiser who can play football, even though he may not have a brain in his head, has an infinitely better chance of winning a college scholarship than the female high school student who is good in the classroom but wouldn't pull the paying fans through the college sports arena turnstiles. Vocational schools traditionally have been oriented toward training males for the higher-paying trades while shunting females off toward secretarial and hair-dresser jobs. It's time these kinds of discrimination, as well as many others in the educational system, are ended.

So far as rules requiring integration of physical education programs are concerned, there doesn't seem to be much reason for a big hulla-baloo. They don't mean that boys and girls are going to be taking showers together or using the same wash rooms. Nor do they mean that boys and girls are going to be wrestling one another in high school and college gyms across the country, for bodily contact sports are specifically exempted from the integration orders.

What it does mean is that schools and colleges are going to have to start spending more on female sports programs and allowing girls to participate in non-bodily contact sports that now are largely reserved for males.

We doubt that big-time college sports are going to suffer seriously from rules that require the scholarship and financial aid pot to be split more evenly between the sexes, or from an increase in financial outlay for female sports programs. Colleges no doubt will find ways to subsidize all the superstar jocks they think they need, and the fans will continue coming up with the ever-increasing price of tickets to finance the expensive stadia and trappings that go with college sports. Even if the regulations were to put a crimp in inter-collegiate athletic programs, it might be a good thing. Sports programs should be aimed at getting the maximum participation possible among students, not at building teams for maximum box-office draw. Professional sports should be left to the professional leagues.

Legislation against sex discrimination in educational institutions was enacted three years ago by Congress. It took HEW all this time to get the specific regulations drafted to carry out that law, and these rules still are subject to rejection by Congress within 45 days. If Congress believes in the law it has passed, it ought to let the regulations become effective.

Equal educational opportunity for women is, as HEW Secretary Caspar Weinberger said the other day when he announced the regulations, "the law of the land." So let's get on with enforcing it.

[From the San Francisco Chronicle, June 6, 1975]

EQUALIZING THE SEXES

The new HEW regulations on equal opportunities for men and women in schools, colleges and universities have the unexceptionable aim of ending discriminatory practices. That is just and right for all situations in which true, or nearly true, equality can be achieved. But integration of the sexes obviously won't work for football and certain other sports, and Caspar Weinberger, the Secretary of Health, Education and Welfare, is wisely not trying to pit the two sexes against each other in games of violent contact.

Apart from these instances, non-discrimination ought to rule the academic scene; it is certainly high time to admit, employ, financially aid and counsel girls and women on the same basis as boys and men, without marking them down or screening them out because of their sex. Some girls want to study auto or shop mechanics, some don't; the same with boys desiring home economics courses. It is encouraging to see the knocking down of prejudiced, sex-linked barriers against such choices.

Inevitably complaints will be heard from male adults who find a threat to their amour propre in rules requiring the joining of the two sexes in physical education classes and in non-contact sports. They are, we fear, prime subjects for reeducation; it is too bad it must come so late in life for so many. The younger generation, already introduced to non-discrimination in the classroom, has begun to experience it in sports on such far-advanced campuses as those of the University of California, Stanford and USF. Doubtless the young will accept the new Title IX rules without breaking stride.

[From the Chicago Daily News, June 9, 1975]

EXPELLING SEX BIASES

The long-awaited federal guidelines against sex discrimination in the nation's schools and colleges will have their greatest effect on sports. Most of the stereotyping that barred girls from taking shop courses and boys from learning to cook and sew will have vanished by now in all but the most backward schools. But gym classes and team sports are another matter.

A revolution of sorts is implicit in the new rules laid down by the Department of Health, Education and Welfare. In any school receiving federal aid—and that means some 16,000 public school systems and 2,700 colleges and universities—females must be granted equal opportunities in physical education as well as in all other areas of learning.

This does not mean boys and girls showering together, or roughing each other up on the football field. Separate but equal is the rule when it comes to facilities and contact sports. But it does mean coed physical education classes in the lower schools, increased funding for women's sports teams wherever there is a demand for them, and mixed teams of men and women in noncontact sports where there is insufficient demand for separate—and equal—women's teams.

All this is flying in the face of very long tradition, and will take some getting used to. But the evidence of gross discrimination against women in sports demanded some action by HEW, and the guidelines strike a sensible course in allowing for biological differences yet insisting on equal opportunities.

The rules do not require equal spending necessarily, so the howls that they will be the ruination of big-time college athletics are somewhat premature. But the rules will have some effect in the strapped financial circumstances many colleges find themselves in. Either more funds will have to be raised for women's athletics, or some of the present funds will have to be diverted from the men to the women. It will no longer be possible to lavish money on a football team while forcing the women to hold a bake sale to support their winning tennis team. The discrepancies were illustrated by a report last year showing that only 5 percent of the $6 million budgeted for intercollegiate sports went to women in the 10 state-supported universities in Illinois. A considerable reordering of priorities is due.

But that isn't necessarily bad for sport. The overemphasis and the growing professionalism of college sports (men's sports, that is), has been a scandal for years. Giving female athletes a fair deal may indeed shake up the system, but it's a shakeup that is overdue.

[From the Raleigh News and Observer, June 13, 1975]

FAIR PLAY IS BASIS OF HEW SEX RULES

The federal government's guidelines for banning sexual discrimination in public schools may disturb some local customs, but by and large, the rules confirm what has become case law and public policy in the United States.

The rules have been offered by a Republican administration headed by Gerald Ford of Grand Rapids, Mich., certainly not a source of radicalism. The Congress approved the law on which the rules are founded and before they are implemented, congressional review, which begins June 23, will look for discrepancies between the rules and the law. Caspar W. Weinberger, Secretary of Health, Education, and Welfare, says schools have from one to three years to comply.

Public schools have had ample time to prepare for the recommendations, an observation made by Raleigh and Wake school officials last week. They have been wise enough to institute the recommendations and already have mixed athletic classes, for example, where appropriate.

It is the integration of athletics that has caused the greatest uproar, though the guidelines affect school policies in general. Vocational classes, for instance, no longer may be segregated by sex. Boys must be permitted to take home economics courses just as girls must be allowed in shop classes. There is nothing revolutionary or worrisome about that.

Understandable concern is raised about the impact on school sports. The intent, and probably the basic result of the rules, is to encourage public schools to extend athletic opportunities to girls. That is a commendable goal, and informal objections to it have more to do with money than sexual mores. While girls may try out for non-contact male teams such as swimming, track or tennis, they may not seek equal entry to sports such as football or wrestling.

Nor is there a requirement for equal funding by sex, a point Weinberger emphasized. Popular, all-male programs such as football need not be sacrificed because of a lack of separate but equal female programs. Interpretation of the rules on financing will have much to do with their impact, but they clearly signal an end to traditional funding neglect of female sports.

Women deserve a chance to develop athletic skills. The HEW guidelines serve notice that they will get that chance if it is not already offered.

[From the Edwardsville (Ill.) Intelligencer, June 7, 1975]

FAIR PLAY ON SEX GUIDELINES

The U.S. Health, Education, and Welfare Department (HEW) has issued new guidelines intended to eliminate sex discrimination in physical education activities.

One rule requires that girls' teams be established for competition between schools, or else that women be allowed to try out for boys' teams in non-contact sports.

Another rule requires that regular gym classes be sexually integrated except for contact sports such as football and basketball. Separate showers and locker rooms will be allowed.

There will be difficulties and problems involved for teachers, administrators and young people, but they are not insurmountable if common sense and a sense of fair play rather than prejudices and begrudging acceptance of the guidelines prevail in the schools.

The point of the guidelines is not to force girls or boys into embarrassing situations or unfair competition. Nor is it to try to wipe out differences between males and females.

Rather, it is to attempt to give meaning to the legal concept of equal educational opportunities, regardless of a person's sex.

As with racial integration of the schools, it would have been far better if that reality had come about without laws or federal guidelines. It didn't in most places.

The law calling for equal opportunities regardless of sex is sound in its objective. The guidelines are not unreasonable, especially if they are approached not as rigid rules to be imposed in an unthinking manner, but rather as a way to help boys and girls to come to better understand one another and to realize their fullest potential as individuals.

Athletics is one way people can do that—either in competition between schools or in physical education. Girls as well as boys deserve that chance.

It may be true that some girls have difficulty competing with some boys. But that's a problem that has far more to do with individual talents and capacities than it does with whether one is a male or a female.

Given more encouragement and better instruction throughout their growing years, we suspect that more and more girls will develop their skills well enough that many boys will find it difficult to keep up with them.

There already are many female athletes around who are pretty tough. And they don't necessarily sacrifice prettiness to their athletic accomplishments. That's a point people who fear encouraging girls in athletics will lead to a decline in femininity should keep in mind.

None of that need be bad as long as the competition is in the spirit that unfortunately has declined in too many athletic and physical education programs: "It's not so important whether you win or lose as how you play the game."

Sports and physical skills take hard work and self discipline, but they need not be grim. They should be fun.

Unless boys and girls have changed, we imagine that by getting more accustomed to competing and participating in athletics on a more equal basis and doing it together, they'll have more fun and have more respect for and understanding of one another as people.

And education systems that can help accomplish that will be accomplishing a great deal.

[From the Monroe (La.) News Star, June 12, 1975]

FIGURING THE COST

Far from the last word has been heard on the regulations handed down by the Department of Health, Education and Welfare on the subject of sexually integrated physical education. Those regulations are plain enough—full integration must occur in physical education classes and sports programs, excepting only body contact sports like football or wrestling.

Almost before the HEW announcement had been distributed, a House subcommittee announced it will be holding hearings to take testimony from groups of both sexes protesting the HEW action. Other committees may enter the fray as the full consequence of the regulations is understood.

Whatever action Congress may produce will not be the last word either. It is at the individual school level that the force of the HEW policy is implemented, and the choices open to school boards and administrators is not great: Either sexually integrate all physical education programs or face loss of federal funds.

There is a third option, and it may be the one some schools elect to take. That is to sharply curtail all physical education activities, including intercollegiate sports. Athletic teams, with the exception of football and basketball, generally lose money.

At a time when many schools find it difficult enough to balance their books, they may simply decide the easy answer to a highly charged situation is to cut the athletic program down to that part which can pay its own way. That won't leave much for anyone.

[From the Tulsa World, June 22, 1975]

FOOTBALL, MONEY AND SEX

The battle of the sexes has moved from college campuses to Congress, where male spokesmen for such sports as football and basketball are trying to keep women in what they consider their place.

The president of the National Collegiate Athletic Association told a House subcommittee Friday that requiring equal treatment of men's and women's sports would badly hurt present revenue-producers—mainly football and basketball.

Of late the Courts and the Department of Health, Education and Welfare have been insisting on equal treatment of women in sports. The NCAA president John A. Fuzak, said HEW "has been absolutely unwilling to look at the economic structure and realities of college athletics. . . ."

The gentleman has a point. Imposing "equal rights" on the college sports will seriously affect the present structure. The few revenue-raising sports, mainly football and basketball are already supporting a host of little brothers and sisters swimming, track, baseball, archery and whatnot. That includes both male and female secondary sports.

If women's *sports have to be given as much money*, personnel and emphasis as men's, it's going to be—in the vernacular—a new ball game. More money will have to be raised or funds will have to be taken from the present sports program.

However, it isn't quite so clearcut. Many people think colleges are overemphasizing football and in some cases basketball, spending literally millions of dollars every year to keep them going in grandiose style. In this view, coming down to earth would be wholesome for an overblown male culture.

In the end, we believe an accommodation can be reached. There is truth on both sides. Some male sports have grown to ridiculous proportions—but there's no way for women's events to become suddenly equal in any respect. It's appropriate to build up women's athletics, even if it means cutting some of the fat out of football or basketball. But there's no sense in destroying the only paying parts of the program.

[From the Tacoma News-Tribune, June 11, 1975]

Girls Are People, Too

We are proud our state recognizes that girls are people, too, and that the new federal rules against sex bias in school and college athletics will not, therefore, discommode us much.

The rules drawn up by the Department of Health, Education and Welfare and sent to Congress for approval are not severe. They only offer girls and young women the same or similar opportunities given to boys and men.

The response in Washington State appears to be that boys and girls attend gym classes together in many schools. In most of our colleges and schools, the female sex has a good physical ed program, and more and more girls' sports teams are emerging.

Women have been changing many male minds of late. There used to be a feeling, especially in the East, that women turn into Amazons when they pound down a basketball court, play a smashing tennis game or belt a softball into the next county.

Recently, a woman climbed Mt. Everest, others are on the way, and our American team climbing K-2 has a woman aboard.

Washingtonians always have had a long list of female athletes to admire—girls such as Kaye Hall, Janet Hopps, Doris Brown, Patty Johnson, Helene Madison, Joanne Gunderson Carner, Pat Harbottle, Anne Quast, Gretchen Fraser. Women in sports are nothing new for us.

[From the Bloomington Pantagraph, June 5, 1975]

Girls Will Be Boys?

If the new rules proposed by the Department of Health, Education and Welfare to bar sex discrimination in schools are accepted in toto by Congress, the Equal Rights Amendment, if ratified, will have come after the fact.

The regulations are bound to stir heat, and maybe even some light, in Congress and out. The bigs in the collegiate athletic field will be heard from, of course. Women's athletics' will get stronger support from the feds.

But the deepest running resentment may come at elementary and high school levels where parents, if not teachers and school boards, will have a thing or two to say about coed physical education classes and drumming up girls for some vocational education classes so the appearance of sex discrimination will be erased.

The newest HEW regulations are not the invention of a bureaucrat who thinks women have been oppressed. The rules are the product of revision after revision by HEW under heavy pressure to get rules which properly reflect current nondiscrimination statutes put on the books by Congress.

All the rules are linked to nondiscrimination schemes in laws which grant federal funds, loans, contracts, to schools. Private schools getting such funds fall under the rules.

There is nothing in the rules (we think) which says students must share the same shower rooms and toilet rooms. Short of that, the rules allow only for separation in contact sports and in sex education. Oh those HEW prudes!

[From the Washington Post, June 10, 1975]

HEW's Rules on Women and Education

With all the hullabaloo over the impact on college sports of the new federal sex bias rules, it is easy to overlook the real importance of those rules which is that they should open the country's educational institutions to women in a way they have never been open before. That will mean, in the long run, more female doctors and other professionals, more female scholars and college teachers, more females in technical jobs, and, to some extent, more female athletes. The rules mean, simply, that the nation is taking another significant step toward a time when intellect and talent and competence in general will be recognized as such in all endeavors—whether academic or athletic—regardless of the sex of the person concerned.

In that sense, the fight over what these rules will do to sports and athletic programs is a side issue. The real impact of them will be on things that matter much more in life—things like admission to vocational and professional schools and public colleges, access to courses and scholarship funds, and employment practices. In these areas, as well as in athletics, educational institutions at all levels have consistently discriminated against women down through the years. The new rules, if they are properly enforced by HEW, will do much to eliminate that discrimination.

There is also a matter of basic fairness involved in the athletic programs and if it takes a complete change in the nature of intercollegiate sports to produce that fairness, so be it. There is something fundamentally wrong with a college or university or, for that matter, a lower level school, that relegates its female athletes to second-rate facilities or second-rate equipment or secondrate travel arrangements solely because they are female. There is nothing in the Constitution or in the nature of the world that says only males can be athletes or that male athletes are entitled, if they are good enough, to free education, free food and free medical care.

Indeed, we suspect that there are a good many university presidents who, way down deep inside, are cheering that part of the HEW rules having to do directly with sports. The emphasis on all too many campuses has reached the point where it appears the purpose of the university is not to educate young people but to produce winning football or basketball teams. The presidents know this—and despair at what it is doing to their institutions—but many of them have felt unable to tackle the problem because of the power their athletic departments have with alumni. These new rules may provide the impetus they need to begin to bring the right perspective back to the campuses. If so, HEW's efforts will serve not only to give to women what is rightfully theirs but to restore some balance between what is meaningful in higher education and what is fun and games.

[From the Idaho Statesman, June 10, 1975]

Let the Girls Learn To Hammer

America's schools and colleges should be able to learn to live with new regulations to reduce sex discrimination. Many of them are already well along the road to compliance.

The Department of Health, Education and Welfare rules require equal opportunity, but not necessarily equal dollars. Women must have the opportunity to participate in the same athletic activities as men, but not on the same dollar scale.

Gym classes are to be integrated, except for contact sports. Youngsters can be grouped by ability.

Requirements for athletics may be the least important aspect of the regulations.

They require equal opportunity in other classes as well. You can't limit industrial arts classes to boys, home economics to girls. You can't set a quota on female admissions to law school or medical school.

Our society tends to steer boys and girls into particular career paths. Boys learn to hammer, girls learn to cook.

It's time girls were allowed to hammer. These regulations won't bring any revolution in the schools or in American society. They merely recognize a revolution that's already here. The schools are being directed to do what they ought to be doing by now without any directives from HEW.

While the specific requirements come from Washington, the basic rules are embodied in the constitution and historical ideas about equality and fairness.

[From the Anchorage Daily Times, June 11, 1975]

KNOCKOUT PUNCH

The sports world—or at least the male chauvinistic part—is reeling these days from what many are predicting will be a knockout punch to big time college athletic programs.

The punch was thrown this week by President Ford's administration, which announced proposed new regulations by the Department of Health, Education and Welfare banning sex discrimination in all educational activities, including athletics.

The regulations, to become effective July 21 unless overturned by congressional action, strike all colleges and universities receiving federal aid. The application of the new regulations will be felt by virtually every institution of higher learning in the country—and certainly those boasting major football, basketball and track powerhouses.

The impact in Alaska, so far as we can judge at this stage, is zero in the sense that the University of Alaska's athletic programs and those of Sheldon Jackson Junior College and Alaska Methodist University are fully subsidized.

But at Notre Dame or Southern Cal or Texas—you name your favorite—football and basketball especially are big businesses, and the revenue derived from ticket sales and television appearances add up to millions of dollars. Forcing that sort of revenue into a share-and-share-alike budgeting with coed field hockey and volleyball creates an athletic disaster.

Disaster is one of the milder descriptions of the situation by some of the principals in college sports affairs.

But wait a minute. Maybe the long-range outlook isn't all that bad.

For one thing, all of the colleges and universities will be pretty much in the same boat. A general and widespread application of the new financing picture may in some ways depressurize big-time collegiate sports without necessarily reducing the quality or eliminating traditional rivalaries.

For another, the new policies may have some very positive results. Particularly likely, it seems, will be a new emphasis on sports in which women can compete well with men—tennis, golf, gymnastics, track, swimming, skiing and ice skating come quickly to mind.

Why shouldn't a mixed doubles tennis match for the national collegiate title between the University of Florida and Stanford, for example, command a national television audience?

Contact sports are something else, of course. The day will never come, we trust, when Notre Dame will field a female middle line backer against Southern Cal, or Navy will go against Army with a midshipwoman at quarterback throwing passes to a curvaceous wide receiver.

[From the Portland Oregonian, June 5, 1975]

MATCHING THE SEXES

Despite the profound administrative problems imposed, school and college administrators will probably welcome the publication of federal rules on sex integration. Bearing the signature of President Ford, the set of regulations—subject to congressional veto for 45 days—finally spells out in detail requirements of federal law that heretofore have been so vague as to cause confusion in the education establishment.

Title IX in the 1972 education act amendment provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

The Title IX rules published Tuesday are intended to define what that provision really means. The rules will become effective July 21 unless Congress exercises its veto authority. There will be congressional hearings before that date.

The rules will apply to local school systems as well as colleges, private and public, if they receive federal funds of any kind. Congress has exempted all military schools and colleges, including the service academies.

The federal requirements cover almost every facet of instruction and administration—admissions, financial aid, classroom opportunities, dress codes, athletics and auxiliary activities. Over the protests of some feminist groups, the administration has not chosen to try to control what has been called "sexism" in some textbooks.

Elementary schools will have one year from July 21 to comply, high schools and colleges three years. The consequences of the federally-enforced regulations are bound to be sweeping in school and campus administration and in the conduct of athletic programs.

Under the new rules, schools and colleges would be permitted to organize separate teams in contacts ports, such as football, basketball, wrestling and hockey. If enough women have an interest in participating in a contact sport in which men have a team, a women's team must be provided. In noncontact sports, such as track and field, women must be allowed to compete for places on a men's team if there are not enough women interested to form a women's team.

Nationwide compliance with the regulations on athletics would unquestionably put a burden on the box office returns of such male sports as football and basketball, which have been picking up the tab for other intercollegiate sports. Athletic budgets, including those in Oregon, have already felt the pinch of extending competitive athletics to a greater number of women.

Classroom and gymnasium courses must be integrated, except in certain instances of sex education.

In short, the lengthy regulations are designed to eliminate sex discrimination outlawed by Title IX, except for the most reasonable segregation of the sexes. The qualification "most reasonable" is important. Federal steps toward enforcement of Title IX prior to the publication of the regulations have been, in some instances, highly unreasonable.

The civil rights investigators in the Department of Health, Education and Welfare, which will have responsibility for the enforcement of the law, must all understand the basic proposition that there is, indeed, an important difference between boys and girls, between men and women. It should be honored when there is no evidence of harmful discrimination.

[From the Cleveland Plain Dealer, June 21, 1975]

NCAA CLINGS TO STATUS QUO

The National Collegiate Athletic Association's opposition to federal regulations designed to curb discrimination against women appears to be founded on a resistance to change.

The NCAA likes intercollegiate athletics the way they are.

The NCAA attempted but failed to persuade the Department of Health, Education and Welfare to exempt revenue-producing sports from HEW's rules prohibiting discrimination in all areas of education.

If such sports are not exempt, the NCAA keeps saying, intercollegiate athletics as they exist today may be destroyed.

Long before HEW got around to issuing its regulations to carry out Title IX, the antidiscrimination section of the Education Amendments Act of 1972, many colleges and universities had already acknowledged the need to reconsider the amounts spent on sports in which participation is severely limited. With or without HEW changes seem to be on the way.

The NCAA argues that sports that generate revenue ought to have first, exclusive call on that money. If any is left over, it's OK, according to the NCAA, to share it with other college sports programs—but it still should not be required to be shared with women's sports (though in fact at many schools such revenues do help support female athletic programs).

The president of the NCAA told Congress last week that "failure to provide some protection for revenues from those sports which enjoy significant public interest would eventually result in an erosion of that interest and consequently an erosion of those revenues."

The NCAA viewpoint seems to have been adopted wholeheartedly by U.S. Rep. Ron Mottl, D-23, who attended Notre Dame on a baseball scholarship. Mottl, U.S. Rep. James G. O'Hara, D-Mich., and U.S. Sen. Jesse A. Helms, R-N.C., should drop their attempts to reject the HEW regulations which, unlike other departmental rulings are subject to congressional review and rejection.

What the NCAA and the congressmen seem to have overlooked is HEW's point-blank statement that its regulations do not require exactly equal expenditures for male and female students or for men's and women's teams. It does not seem to us that the regulations endanger any existing sports programs, and we urge Congress to allow the regulations to take effect.

[From the Spokane Daily Chronicle, June 4, 1975]

New Sport Rules Workable

Federal rules designed to bar sex discrimination in school physical education classes and athletic programs avoided most of the obvious pitfalls but there will be some problem areas in implementing them.

For instance, the Department of Health, Education and Welfare's newly announced rules do not force schools to spend equally on athletic teams for girls and boys and they do permit separate teams in contact sports.

Requiring equal expenditures on girls' teams could have marked the end of men's college athletics, already threatened by a financial crunch.

And opening men's football, wrestling, basketball and other contact sports teams to women could not only endanger the health of the female competitors but risk some morals problems as well.

But requiring the integration of non-contact sports is likely to result in the freezing out of most women athletes from school teams.

For while some girls can compete with boys in tennis, track, swimming and golf, the majority cannot, especially in college and the upper grades of high school.

So it must be assumed that separate girls' teams still will be available for those girls who do not make the varsity in competition with their male schoolmates.

Giving elementary schools a grace period of one year and high schools and colleges three years in which to bring their programs into compliance was logical.

This should give most school officials time to think through the unworkable portions of HEW's new rules and possibly seek changes before they must comply.

The new rules will place additional financial burdens on already hard-pressed school systems and colleges.

But most of HEW's rules likely can be made workable and school officials would have to agree they could have been a lot worse.

[From the Atlanta Journal, June 11, 1975]

Rules and Regulations

Feminist groups say the new regulations of the U.S. Department of Health, Education and Welfare regarding sex bias in education are too weak while groups concerned with intercollegiate athletics say they are too strong.

And still others say the federal government simply has no business regulating how schools and colleges run their athletic programs and physical education classes.

But in all the controversy there's one aspect that's being overlooked, and that is the question of the procedure involved in making the rules, as distinct from their substance.

The HEW rules are promulgated by that department, part of the executive branch of government, not by Congress. True, they are issued in pursuance of a law passed by Congress. As HEW Secretary Caspar Weinberger said in transmitting the rules to the President, "With little legislative history, debate, or I'm afraid, thought about difficult problems of application, the Congress enacted a broad prohibition against sex discrimination in any education program or activity receiving federal assistance." Now somebody has to figure out what that means.

This problem of administrative agencies virtually making law was the one which concerned Rep. Elliott Levitas when he proposed and got through a provision that such rules henceforth must be sent to Congress for approval, amendment or rejection. Thus, these HEW rules about sex discrimination can be modified by Congress before going into effect on July 21.

The Levitas reform was a great step forward, as we said at the time. But it still is a little strange that Congress is in the position of being told what it meant when it passed a law, even if it now has, thanks to Levitas, a chance to say whether it meant what HEW says it did.

The issue is the same with many other regulations from many other agencies, such as the Federal Trade Commission's new rules on advertising prescription drugs. Quite apart from the wisdom of the rulings—and obviously some are good and some are bad—we have taken only one step in the battle to restore lawmaking power and responsibility to Congress. The next step is for Congress to think more about what it intends when it passes a bill instead of waiting for a regualtory agency to tell it some months later what it meant.

[From the Miami Herald, June 5, 1975]

SEX DISCRIMINATION FLUNKS OUT

Within the next year, administrators of schools and colleges will be carrying out an important assignment. They will have to "identify any discriminatory policies or practices which may exist within their institutions and to take whatever remedial action is needed." Otherwise the U.S. Department of Health, Education and Welfare may cut off their federal funds—or worse.

While HEW's order is an attempt to guarantee equal opportunity in all programs, sports is the area that is getting the most public attention and perhaps is fraught with the most controversy.

There is danger that the facts of the program will be obscured by emotion. While the rules will open up many more opportunities for women to participate in sports activities, they do not spell the end of intercollegiate athletics, as HEW Secretary Caspar W. Weinberger is quick to point out.

The law doesn't require that women be allowed to play on men's teams unless no women's teams are provided and the school has a record of discriminating against women in non-contact sports.

Nevertheless, the National Collegiate Athletic Association is expected to wage a furious attack upon the program. In the process, the public may get some helpful insights into the power that athletic directors are able to wield within the educational system and the politics that shuts out not only most women but most men from meaningful participation in sports activities.

Purpose of the HEW rules is to give every person an opportunity to participate in all school endeavors—including sports—with no limitations except those imposed by personal desire and natural ability. There shouldn't be much quarrel with a goal like that.

[From the Los Angeles Times, June 6, 1975]

SEX EQUALITY: WHY THE FUSS?

Equality of opportunity is what America is about.

But tell that to the youngster who is denied the opportunity even to try out for the school tennis team or the swimming squad just because that youngster is a girl.

Now that girl may not grow up to be another Billie Jean King, but every boy given the opportunity to try out for the school baseball team will not grow up to be another Steve Garvey.

Still, sexual stereotyping is a fact of life. It is more than an attitude because it has become institionalized by law and by custom. Slowly but surely there is a recognition that this stereotyping is inconsistent with what the nation stands for.

That is precisely what the Department of Health, Education and Welfare has done in setting down sweeping rules that would bar sex discrimination in virtually all the nation's schools and colleges.

Schools that discriminate in admissions, classroom instruction, after-school activities, financial aid, housing, employment and sports could lose financial aid. That, we trust, will be a powerful incentive for compliance.

The rules are intended to make equality of opportunity a reality. They will not change attitudes, of course. But over a period of time, the practical effect of the rules should change the way the nation regards men and women, their potential and their roles in society.

It is disturbing, but not surprising, that the most controversial rule covers equality of opportunity in sports. Tradition dies hard, and the American tradition has been to keep the girls off the playing field. That has been changed, but not enough.

In any event, the fear and trembling are an overreaction. The sports rule requires only equality of opportunity. It does not require equality of funding. Schools can have separate teams in contact sports. There can be groupings based on ability.

These provisions are so sensible that we cannot understand the fuss. The rule in no way means the demise of big-time college athletics for men. It may mean that some day women will have their day.

Winning isn't everything. There is much to be said for exercise, discipline, learning skills, individual achievement, teamwork, fair play. With equality of opportunity in school sports—from elementary grades to college—the nation takes an important step toward equality of opportunity in society.

[From the Metro-East Journal, June 8, 1975]

SEX GUIDELINES REASONABLE

The U.S. Health, Education and Welfare Department (HEW) has issued new guidelines intended to eliminate sex discrimination in physical education activities.

One rule requires that girls' teams be established for competition between schools, or else that women be allowed to try out for boys' teams in non-contact sports.

Another rule requires that regular gym classes be sexually integrated, except for contact sports such as football and basketball. Separate showers and locker rooms will be allowed.

There will be difficulties and problems involved for teachers, administrators and young people, but they are not insurmountable if common sense and a sense of fair play rather than prejudice and begrudging acceptance of the guidelines prevail in the schools.

The point of the guidelines is not to force girls or boys into embarrassing situations or unfair competition. Nor is it to try to wipe out differences between males and females.

Rather, it is to attempt to give meaning to the legal concept of equal educational opportunities, regardless of a persons sex.

The law calling for equal opportunities regardless of sex is sound in its objective. The guidelines are not unreasonable, especially if they are approached not as rigid rules to be imposed in an unthinking manner, but rather as a way to help boys and girls to come to better understand one another and to realize their fullest potential as individuals.

It may be true that some girls will have difficulty competing with some boys. But that's a problem that has far more to do with individual talents and capacities than it does with whether one is a male or female.

Given more encouragement and better instruction throughout their growing years, we suspect that more and more girls will develop their skills well enough that many boys will find it difficult to keep up with them.

None of that need be bad as long as the competition is in the spirit that unfortunately has declined in too many athletic and physical education programs: "It's not so important whether you win or lose as how you play the game."

Unless boys and girls have changed, we imagine that by getting more accustomed to competing and participating in athletics on a more equal basis and doing it together, they'll have more fun and have more respect for and understanding of one another as people.

And education systems that can help accomplish that will be accomplishing a great deal.

[From the Boston Sunday Globe, June 8, 1975]

SPORTS OF THE FUTURE

The Department of Health, Education, and Welfare has announced new regulations requiring most Federally-supported educational institutions to end discriminatory practices against women in school admissions, employment, financial aid, vocational and academic instruction, and counseling and athletics.

The new regulations have important implications in several areas. In practical terms they do such things as prohibit excluding pregnant students from class, forbid institutions from using marital status as a basis for denying admissions or employment of teachers, mandate equal financial aid and scholarships for women and men, and forbid schools from admitting women on a quota basis or from applying stiffer standards to women applicants than to men.

Despite these and other important features of the new regulations, most of the comment and controversy has centered around the athletic provisions. Somehow that isn't surprising. We are a sports-happy nation, and the new HEW regulations naturally touch many of us.

The rules require schools to sexually integrate physical education courses except in instances where body contact sports or sexual education instruction are involved. This idea seems to strike many people, mostly men, as a terrible thing; and they have complained about it loudly for a year now, ever since the original, more forceful HEW guidelines were released for public comment.

There also has been considerable criticism of provisions requiring schools, colleges, and universities to equalize opportunities for women in sports. To accomplish this, most institutions would be forced to spend more money on women's athletics which, in most cases, would mean less money for men's sports and, some say, the end of intercollegiate athletic programs.

The complaints have had some effect because the original guidelines were stronger than those presented Tuesday to Congress, which has 45 days in which to accept or reject them. The original proposed rules required that women, if they wished, be allowed to join men in playing body-contact sports like football, ice hockey, rugby, and basketball. They required schools to make affirmative efforts to publicize women's sports programs and to train women to expand their interest and capabilities in sports.

Those provisions were left out of the new regulations, and some women who have been fighting against sexual discrimination in sports are unhappy at their exclusion. They want nothing less than full equality for women in school athletics, something that would require, among other things, that institutions spend equal amounts of money on women's and men's sports.

The new HEW regulations which outlaw sex bias in school sports are a step, if not a leap, in the right direction. The flaw in the regulations does not lie so much in the outlined requirements but in the terms for their enforcement. The rules order institutions to conduct a process of self-examination to identify discriminatory practices within and to take steps to correct any irregularities.

HEW Secretary Casper Weinberger noted that this portion of the regulation had been drafted with the assumption of good faith on the part of the 16,000 school systems and 2700 colleges and universities which must comply. Good faith is fine in theory but has a way of not working in practice.

Even more discouraging is the fact that HEW, anticipating an increase in complaints as a result of the new regulations, has announced a new procedural plan to stop investigating individual complaints of sexual as well as racial bias. They are, they say, already overburdened by individual complaints. Many of these, they say, are similar, if not identical. In the future they will try to identify trends in discrimination and counteract those trends, rather than deal with complaints on a case by case basis.

The new procedural regulation, like HEW's reliance in the good faith of the schools, colleges and universities, means that women and minorities cannot rely upon HEW's investigative arm, the Office of Civil Rights, and will be forced to take cases of discrimination to the courts.

[From the Richmond Times-Dispatch, June 6, 1975]

"SUPERBOARD"

As anticipated in an April 2 editorial ("Sense on Sports"), the final draft of the HEW antisexism rules for the nation's colleges and schools, as approved by President Ford, was considerably more reasonable and realistic when released this week than was the original, Orwellian version drawn up by zealous bureaucrats.

Particularly was this so in sports, a field in which equality lovers would try to banish physical differences by fiat. Gone is the titillating prospect of male-female competition in contact sports. Gone is the requirement of equal spending for men's and women's sports, a requirement that could have killed intercollegiate athletics. Gone are possible sex-integrated sex education classes (though general "phys ed" still must be coed).

In the academic realm, it was particularly gratifying that Mr. Ford and HEW Secretary Caspar W. Weinberger resisted efforts of certain women's libbers to have the federal government ban the use of textbooks charged with stereotyping the roles of the sexes. That would have been official censorship pure and simple, and national censorship at that! We'd be willing to bet that many of the proponents are among the first to stereotype as ignorant redneck censors any citizens objecting before their local school boards to obscenity or sacrilege in modern curriculum materials.

But those persons who dwell on the relative moderation of the rules, or who argue the merits of sexual equality in all forms of education, miss an essential point with regard to HEW's laying down the law, we fear. And that is the loss of local control of public schooling that inevitably comes as part of the deal.

Regardless of the rightness or wrongness of specific HEW guidelines (which, in any event, can be changed by succeeding generations of pencil-pushers), we now have an agency in Washington, D.C., deciding for 16,000 local school boards and 2,700 college boards of trustees across the land that, for example, pregnant students cannot be denied admission to any regular school program. We have government employees in Washington deciding that male and female students shall have the same curfew times. Presumably those same faceless dictators can set the curfew at 2 a.m., or decree that there be no curfew at all, if that is their desire.

What America now has is a national school board. And a real "superboard" it is, too, for it can set policy for the mightieth university and the one-room kindergarten alike. Persons who argued two decades ago that federal aid to education would eventually bring federal control of education were ridiculed as mossbacks. But their predictions have come true. What are we to conclude about current arguments that federal aid to state land-use planning could not possibly bring federal land-use control at some later date?

Do most Americans really want to forfeit local control of their schools? We don't think so. Their elected representatives in Congress, who invited bureaucratic dominion in the first place by passing an open-ended law, could reject the Title IX rules in the 45 days given them for review. Or, perhaps more likely, they could succumb to organized pressures by feminist groups to dictate even more binding rules for local schools. But then as presently constituted. Congress has a hard time doing anything about anything in 45 days.

[From the Washington Post, June 25, 1975]

THE REBELLION OF THE CHANCELLORS

Some things are nobody's fault. But that doesn't make them any better: it's merely the best that can be said of them. What moves us to these cosmic thoughts is the dispute now apparently being settled between a couple of agencies of the federal government, on the one hand, and representatives of a number of universities, on the other, concerning affirmative action employment plans. The conditions the universities had been told they would have to meet if they were to receive certain federal contracts, were, in the main, preposterous and pointless. The situation was nobody's fault because it was—manifestly—the product of political, legal and bureaucratic "snowballing," the unattended and all but accidental growth of a simple dictum against discrimination into a set of requirements that hardly any university could be (or should be) required to meet.

These are the facts: a large number of colleges and universities were recently warned by HEW's Office of Civil Rights that they stood to lose millions of dollars in federal contracts for failure to demonstrate to the appropriate agencies of government that they were taking adequate steps to eliminate discrimination against minorities and women in their hiring, promotion and related employment policies. Thanks to a series of bureaucratic confusions and defaults, many of the affected schools did not receive this news until there was insufficient time to do anything about it before the contracts were to be awarded. But it would not have mattered much if they *had* been given ample notice. For the fact is that the information required by the HEW-Labor Department regulations as spelled out in an agreement the universities were originally asked to sign, was well beyond the capacity of most of the schools to produce—at least if they were going to do much else. Edwin Young, the chancellor of the University of Wisconsin, estimated that between 50,000 and 100,000 separate statistical procedures would have been entailed in an effort to produce the desired data concerning employer-employee relations.

Now, owing in large part to the pressures brought by spokesmen for some of the affected schools and to the good sense of Secretaries Dunlop and Weinberger—who were apparently greatly distressed by the situation that had been created—the original so-called model "conciliation" agreement put forward by HEW has been set aside. Commitment to fulfilling its incredible terms will no longer be a condition for receiving these federal contracts. A stopgap short-form agreement, pledging reason and good faith and an expeditious fulfillment of the requirements of the law will replace the offending document. And it is the intention of both the universities and the Departments of Labor and HEW to work out some kind of arrangement that bears more directly on the original intent of the Frankenstein regulations: namely the elimination of discriminatory employment policies and practices in the universities. What had taken the place of this laudable goal was a punishing demand for a torrent of statistics.

It is worth noting a few things about this whole melee. One is that the government now has an opportunity to rethink and reform the reflective, oppressive and unproductive way it has been dealing with many of its obligations in this area. Another is that if it fails to do so it will ultimately so thoroughly discredit the original intention of those who sought to bring more fairness to American institutional life it will (if it hasn't done so already) do that cause more harm than good. Especially as the federal government now prepares to apply new, congressionally mandated rules designed to eliminate sex discrimination in the schools, it will be necessary to contrive some simpler and more plausible methods for achieving its goals.

In this connection, we think that Mr. Weinberger's recent statement of preference for broad-based civil rights investigations—as distinct from response to individual complaints—has much to commend it. Mr. Weinberger said he would like to "focus HEW's enforcement machinery on the main, systemic forms of discrimination and give them priority attention to these, rather than follow an approach in which priorities are dictated by the morning's mail . . ." That strkes us as good sense. So too does the government's decision to back down from the impossible terms it had set in the case that caused the chancellors to rebel. The purpose of these laws and regulations, after all, was to generate fairness, not to generate blizzards of paper and threats and sanctions that end up doing next to nothing—except to hobble institutions and make everyone angry.

[From the Knoxville News-Sentinel, June 8, 1975]

TREATING WOMEN FAIRLY

We see nothing unreasonable about the Government's new rules banning sex discrimination at publicly supported schools and colleges around the country.

The rules simply say that women must be given the same opportunities as men to develop their skills, compete for faculty jobs and take part in sports and other extracurricular activities.

Unless rejected by Congress—which is unlikely—the new rules become effective this summer and must be fully complied with by 1978.

As expected, most of the griping about sexual equality is coming from coaches and athletic directors, who say they don't even have enough money to run male sports programs.

Yet if schools can spend hundreds of thousands of dollars each year on the recruiting and maintenance of expensive athletic teams and elaborate coaching staffs for men, there's no reason women should be told there's nothing left in the budget for them.

Jim Kehoe, athletic director at the University of Maryland, says he can't afford to spend a lot of money on women's teams because they don't generate any income.

But the same can be said of most men's teams. Only football and basketball are consistent money-makers.

The new rules do not require that schools spend as much on women's teams as they do on men's. They do require—and rightly so—that women be given decent coaching, facilities and equipment for a change.

In the noncontact sports like tennis and swimming, women must be allowed to compete with men if they chose to do so.

This may seem strange and revolutionary to athletic departments, but it sounds fair and equitable to us.

[From the Louisville Courier-Journal, June 9, 1975]

U.S. SLOWLY ACTS TO END SEX BIAS IN THE SCHOOLS

The only surprising aspect of the Health, Education, and Welfare Department's revised set of guidelines for ending sex discrimination in schools is that it has taken the federal government so long to draft a set of such obvious rules.

Three years have elapsed since Congress banned discrimination between males and females at all levels of public education. A year ago, HEW produced its first draft of proposed regulations for implementing the law and set off a storm of protest. Some congressmen even complained that the department had gone much further than Congress intended.

One particularly controversial point, the implication that since all classes must be open to both sexes this meant sex education, too, was quickly clarified by HEW as a mistake; in the latest version, sex-education classes are exempted. Proposals that would have forced fraternities and sororities, as well as such organizations as Girl Scout troops that are affiliated with federally supported institutions, to admit members of the opposite sex or close down also have been eliminated. No one could quarrel with either change.

BIG-TIME SPORTS ARE SAFE

The opening up of athletic programs is retained, to the dismay of some sports enthusiasts. But most of their objections appear to be exaggerated. After all, even the revised rules wouldn't require equal expenditures on both male and female sports—only equal opportunities. In contact sports, teams would have to be provided for both sexes if there were a demand, but nothing would require that as much be spent on the girls' football team, for instance, as is spent on the male varsity squad. In such noncontact sports as swimming and tennis, schools could let both sexes try out for the team.

It's unlikely, then, that implementation of these rules would wipe out intercollegiate sports events, or any other established program, as some opponents claim. What the rules might encourage some schools to do, and hurray for that, is to make their sports activities less a training ground for professional athletics and more a useful part of the program to prepare young people for the life ahead of them.

Providing for girls' athletics, opening up shop classes to girls and home economics courses to boys, allowing more women to rise to higher positions on the faculty and in administration—these are advances that better school districts and colleges already have made. The federal government's leisurely entry into the field of sex discrimination in education can only give another push to a trend already in motion.

[From the Boston Herald American, June 6, 1975]

WAR OF THE SEXES

The new federal anti-discrimination guidelines issued by the Department of Health, Education and Welfare to purify the nation's schools and colleges of the last stain of male bias ought to endear HEW Secretary Caspar W. Weinberger to feminists, young and old.

But don't count on it. The new rules, it is true, are designed to provide greater opportunity in education for the members of the fair sex. But the changes they prescribe are, in many cases, far less sweeping than anticipated and often they merely formalize what was already in process.

Guarantees of equal opportunity at the college and university level in admissions, employment and financing are long overdue. But the benefits prescribed for their younger sisters of elementary and secondary schools age, particularly in relations to athletic activities, are already gradually being put into effect in public school systems throughout this area.

It is obvious that the guidelines dealing with academic opportunity are of far greater significance than new rules governing physical education and athletic activities. But it is the latter which have stimulated the greater reaction and consequently feed the fires of controversy.

One of the feminists' most insistent demands, fortunately, was rejected out of hand: that was recognition of girls' right to participate, on the basis of full equality, in interscholastic and intercollegiate competition with male athletes.

The new regulations took notice of the wide physical capabilities between the sexes, however, and sensibly stopped short of integrating the more bruising types of contact sports while permitting merging of required physical education programs and the less demanding sport teams.

The makeup, therefore, of tennis, golf and swimming teams, consequently, may become increasingly co-ed, depending upon the prowess of individual competitors. But it makes clear sense that it will be some time—if ever—before the separation will be bridged in football, basketball and hockey and other physically exhausting sports.

Most educators agree that this makes for a sensible arrangement. But it does not satisfy the more angry among equal rights enthusiasts, some of whom have denounced the new criteria as "too little . . . and too ineffective," while their male counterparts are aghast at the prospect of all-male traditions tumbling into dust.

That, of course, is not what is going to happen but it promises to fan the controversy, which is more sound than fury, and assures that the war between the sexes will continue to roll merrily along, despite the noteworthy efforts of the HEW to play the peacemaker.

[From the Christian Science Monitor, June 5, 1975]

ATTACKING SEX BIAS

The new rules approved by Mr. Ford for ending educational discrimination against schoolgirls and college women are welcome.

Not so welcome is a companion HEW proposal to stop responding to individual civil-rights complaints. Such a step, which would permit HEW's Office of Civil Rights to pick and choose among complaints before investigating, could mean lessened enforcement of racial as well as sex discrimination laws.

The Department of Health, Education, and Welfare was required under Title IX of the 1972 equal rights law to formulate rules to end discrimination against women in education. The administration's proposals, if approved by Congress after hearings, would open traditionally sex-stereotyped courses like shop to boys and girls, eliminate sex-based favoritism in admissions and scholarships, and require equality in noneducational facilities such as housing on campuses. These nonathletic regulatons will likely have greater significance for the equality of opportunity for women than the new physical education rules, which are attracting the most controversy.

The athletics proposals do not require institutions or school systems to raise spending on female athletics to current men's levels. But they do require that girls be allowed to compete, if qualified, on boys' teams in noncontact sports, or have the chance to play on a girls' team. In the lower-school grades, schools receiving Title IX funds must merge gym and field classes for boys and girls, while maintaining separate locker-room facilities.

It would be well for the public to be diverted by argument over the new sports rules, such as whether they imply that girls are the equal of boys athletically. Considered as individuals, many girls may be superior athletically to many boys. To note that in many physically demanding endeavors, like dance, the female performer reaches levels of vigor, endurance, and style at least equal to that of men is not to dismiss the distinction between male and female in expression, where that is relevant. Such arguments are best left to statistics and philosophy. It is not necessary to read sex-role significance into running, throwing a ball, or other elementary sports action.

Particularly for women, the general level of physical education in the U.S. is low—from instruction in basic posture and movement to athletic and recreational skills. The automobile and TV set have turned the country's youths, like their parents, into nonwalkers and nonparticipants. The female in society is, during her school and college years, directed into even more of a spectator role by school spending policies that imply sports are for "men."

The new physical education rules may have practical flaws. For instance, collegiate women's athletic groups are apprehensive that the male-dominated organizations are poised to take over their programs, threatening reduced rather than expanded female sports opportunities. But on balance the rules affirm women's rights to equal educational opportunity in admissions, scholarships, instruction, and facilities—athletic as well as academic.

[From the New York Times, June 5, 1975]

SPORTS FOR PAY

Taken by themselves, the inevitable confusion of the guidelines against sex discrimination in school and college sports and the equally inevitable anger of the response by the college athletics lobby might be mildly amusing. Unfortunately, however, the controversy stems from a distortion of values in the commercialized world of college sports that is far more serious than the question of women's role in that particular arena.

The everyday issues of adequate support for girls' and women's teams in schools and colleges should be relatively easy to resolve. Women's physical education activities have been chronically shortchanged at many schools and campuses, and there is need for a fairer distribution of funds. Such details as requiring that physical education classes be coeducational in elementary and secondary schools may well merit some expert reassessment, but questions of what kind are readily adjusted to educational realities.

Far more serious issues are involved, however, in the dark hints by spokesmen for big-time college athletics that the guidelines will torpedo their multimillion-dollar enterprises. Collegiate impresarios appear terrified that their trading in high-priced athletic talent might be scuttled by demands for equal pay in athletic "scholarships" for women. The answer to such fears is that the time has come, not for counting the women in, but for getting the campuses out of their commercialism thinly disguised as college sports.

Mr. O'HARA. Mr. Secretary, first, with respect to the general regulation-making power and, also, the ability of the Congress to review your regulations, I was considerably amused by your suggestion that the mere expression of congressional dissatisfaction, without specific amendatory language, would leave educational institutions throughout the country in the unfortunate position of being told by title IX not to discriminate but left with no regulation defining that discrimination—"Educational institutions should not be left in the dark any longer."

How long have they been left in the dark, and whose fault was that?

Secretary WEINBERGER. Well, we can argue blame all morning.

Mr. O'HARA. There is no argument about it, Mr. Secretary. Three years ago this week title IX was enacted—3 years ago this very week—and because we take 45 days as provided in the statute to review the final regulation, you say, "My, that would be unfair if we delayed this thing."

Secretary WEINBERGER. No; that is not what I said at all. What I said was, if you try to amend a statute without using the legislative process, it will raise constitutional objections, which will continue to leave educational institutions in the dark.

I suggest, the 3-year delay was at least partially due to the fact we were given a very, very difficult task, with the 37-word prohibitory statute and a very muddy congressional intent. We have done the very best we can, and 1 year ago today, roughly, we published the preliminary proposed form of those regulations. And if we had decided not to take the public—get as much public input as we did, we could have had a short comment period and simply dropped them into the hopper, but we didn't do it. I think it is wise we didn't do it.

Mr. O'HARA. I don't think it was wise that you didn't do that.

Three years is a very long time to be fiddling around with regulations, and it certainly does not come with good grace for you then to say to the Congress "Tut, tut, be careful, you might delay the implementation of the act."

Secretary WEINBERGER. That is not what I am saying at all.

Mr. O'HARA. That is what you say: "The mere expression of congressional dissatisfaction without specific amendatory language, leaves institutions in the unfortunate position of not being able to discriminate," and so forth.

The plain fact of the matter is, under section 431, if Congress disapproves, it has to set forth the reasons for disapproval. The administration then has an opportunity to go back to the drawing board and come forward with changes in the regulations, and you could do that in a matter of weeks, not in the matter of years.

Secretary WEINBERGER. Mr. Chairman, the point I make is, how Congress disapproves.

If Congress disapproves by a concurrent resolution, rather than, as we believe, by the constitutional procedure of passing a bill under which procedure the President has an opportunity to veto and a chance for his veto to be sustained, then we think educational institutions will be left in the dark, because there will be court challenges as to the propriety of an attempt to change a statute by concurrent resolution, rather than by the constitutional procedure of statutory enactment.

Mr. O'HARA. As far as court procedures go with respect to regulations, you know, Mr. Secretary, that the ruling of the court is that they are not going to overturn regulations as long as they have some reasonable relationship to the statute?

Secretary WEINBERGER. That is right.

Mr. O'HARA. And there is no constitutional problem with the executive branch changing its regulations, whether the change occurs as a result of congressional disapproval or whether it occurs as a result of executive initiative. You have been in the practice of frequently changing regulations and surely a change in regulations does not raise a constitutional problem?

Secretary WEINBERGER. No, provided it is done with notice and commentary in the publications and all of that it does. But the question as to whether the regulations should be changed or not is a very fundamental one, and if the Congress feels that they are in need of change, all we are asking, Mr. Chairman, is that you express that desire in what we believe to be a way consistent with the constitutional procedures so that there will not be court challenges that will tie it up another couple of years.

Mr. O'HARA. That is a very dubious proposition.

In other words, what you are saying to us is that, if we enact a statute with a specific scope and intent and you choose to interpret it and issue regulations that we believe go beyond that intent, there then rests on us an affirmative duty to legislate again in order to get the regulations to accommodate the objectives that we sought in the original legislation. I don't think that you can say that the administration, by choosing to interpret a statute in some way contrary to the intent of Congress, can then place on the Congress an affirmative duty to amend the law.

Let me get into specifics——

Secretary WEINBERGER. I wonder if I could comment on that before you do?

Mr. O'HARA. Yes.

Secretary WEINBERGER. What I say is, you speak on putting on Congress the affirmative burden of changing law. Section 431(d) proposes to exercise that burden by enactment of a concurrent resolution, which is exactly the same amount of legislative effort required to enact a statute. The difference is, the concurrent resolution does not comply with the constitutional requirements for changing a statute and does not give to President Ford an opportunity to exercise a veto, and that is a significant difference.

The amount of legislative effort required is exactly the same.

Mr. O'HARA. Mr. Secretary, indeed, nevertheless, what you are trying to do is say we have an affirmative burden to change the law. I think, frankly, as I told Mr. Waggonner, that we are going to have to, if this is going to be the attitude of the administration, if the administration is going to continue to take the attitude that it can write the regulations pretty much as it damn pleases and Congress can then amend the law if it does not like it, my own feeling is, if that is going to be up to the administration and 431(d) is going to be undermined and ignored, then what we are going to have to do is change the Administrative Procedures Act and remove some of the regulation writing power from the executive branch.

Secretary WEINBERGER. Mr. Chairman, that obviously would be a decision which the Congress is perfectly capable of taking and in view of the difficulty of drafting some of these regulations, I would have to add, personally, it is not a decision that would bother me very much.

What I am saying is, there is an obligation on the part of the administration to see that the requirements of the Constitution and of the courts are complied with. We have obviously not writen the regulation in any way we wanted.

We have tried, over what you believe, I gather, is too long a period of time, to try to get them in conformity with the basic intent. What we are saying is, if we misread the intent and if there is something wrong with the regulations and not what the Congress believes is in accordance with its intent, we think we and the public should be told so by a statute, because we believe there is a serious constitutional question, which we feel an obligation to raise, if there is an attempt to change that by a concurrent resolution, which does not go to the President and does not give him an opportunity to exercise his veto and does not give Congress the right and opportunity to sustain that veto.

Mr. O'HARA. Mr. Secretary, I think a serious constitutional question is raised by the extraordinary broad license the administration claimed in writing of regulations.

I note, in your next paragraph, you point out it has been extraordinarily difficult, first, to interpret the intent of Congress?

Secretary Wienberger. Yes; it has, because we have had conflicting suggestions from various authors of the bill. And you have been having testimony before your committee of examples of that same kind of thing.

Mr. O'Hara. I admit to that, that the Congress was not as specific as it should have been. I think, particularly in the athletic area, the Congress was remiss in not spelling out more clearly what it intended. I gladly admit to that.

You, then, gave yourself a second burden—that is, a legislator's burden—and there you stated: "It has been extraordinarily difficult, first, to interpret the intent of Congress and, second, to accommodate the concerns of a wide diversity of interest groups and individuals."

In other words, you are engaging in the lawmaking process?

Secretary Weinberger. No, sir.

Mr. O'Hara. You are doing what Congress is supposed to do.

Secretary Weinberger. No, sir, what Congress told us to do. In title IX, we are required to issue regulations that are basically consistent with goals of the statute and to try to carry out—if I have the exact words here—"carry out regulations that are to be consistent with the achievement of the objectives of the statute."

That is exactly what we tried to do. All we are saying is, if you feel we have not done it correctly, or in accordance with your intent, tell us so by statute. Don't tell us so in a form that will lead to court tests that can delay this thing another couple of years.

Mr. O'Hara. Mr. Secretary, with respect to specifics, title IX, as you say, as you know, imposes a single duty on educational institutions, and it is a negative duty. The only duty imposed on an educational institution by the statute by title IX is the duty to refrain from discriminating on the basis of sex, and regulations are certainly appropriate in order to more clearly define exactly how that, the performance of that duty, will be interpreted by the Department of Health, Education, and Welfare, which, in title IX, is given authority to cut off funds for failure to refrain from discriminating on the basis of sex.

But then you have, in your regulations, some provisions that I think go considerably beyond and impose new burdens and duties on the institution.

First, you provide that each institution must—and this is in regulation section 86.3—"each recipient educational institution shall, within 1 year of the effective date of this part, one, evaluate, in terms of requirements of this part, its current policies and practices and effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel * * *" and so forth.

"Two, modify any of these policies and practices," and, "three, take appropriate remedial action to eliminate any discrimination which resulted or may have resulted and maintain on file for at least 3 years * * *" and so forth and so on.

Now, perhaps that is a good idea. Perhaps the Congress should have even required the institutions to set up a system of self-evaluation, but as a matter of fact, there is nothing in title IX that did require that. All that was required was that the institution, from the effective date of the statute, refrain from discriminating.

Where, in the statutory language of title IX—and I don't want to discuss the wisdom of doing this, because I think it is probably a good idea—is there authority to require the grievance procedure you set forth, in regulation 86.8: "A recipient shall adopt and publish grievance procedures providing for prompt and equal resolution of students and employees' complaints alleging any action which would be prohibited by this part."

Now, Congress only said, "Thou shalt refrain from discriminating." It didn't say, "Thou shalt establish internal grievance procedures in case there were any complaints." Probably that is a good idea, too. Maybe we should have done that, you understand, but we didn't.

I am wondering where, in the plain language of title IX, the Department of Health, Education, and Welfare finds authority to require an institution to establish a grievance procedure and to conduct a self-evaluation program?

Secretary **Weinberger**. Sections 902 and 901 of title IX, where you told us to issue rules and regulations or orders of general applicability, which shall be consistent with achievement of objectives of the statute, from that, we concluded that it would be quite reasonable to ask the institutions, since we believe that you get much better enforcement if you have self-enforcement, we believe it would be very reasonable, as a means of achieving that objective, to have institutions, first of all, evaluate their own compliance. This means reading the statute and reading the regulation, which I don't think is an unreasonable burden.

It means then keeping the data necessary to enable them to tell whether they are in violation or not. That is a reasonable requirement, because if we are going to allege violation and go through the procedure, which the Congress directed, of taking funds away on any basis of violation, we have to have data.

It is quite reasonable to require colleges to keep that data. As far as grievance procedure is concerned, again, I think it is consistent with the objectives of that statute to have this kind of attempt made to give institutions an opportunity to resolve allegations of discrimination in-house before the Federal Government becomes involved.

There are two or three different ways you can do it, all consistent with the broad direction of the Congress, that we issue regulations to achieve the objectives of the statute.

We chose to do one that requires the universities and colleges, first of all, to examine the law and the regulation and, second, to see if they are in compliance and keep the data to help in enforcement and help them answer charges or complaints that may be made by individuals and, third, to set up some kind of internal grievance procedure of their own so we can minimize the Federal enforcement effort and get the best kind of enforcement, which is voluntary compliance.

Mr. **O'Hara**. So, you do not claim any specific warrant in section 902 for those, but you do believe that those kinds of requirements are authorized by section 902 as being under your direction to effectuate provisions of 901 by issuing rules, regulations, and orders of general applicability, which shall be consistent with achievement of objectives of the statute? You read it broadly to permit you to require that the university itself take certain actions, in addition to simply refraining from discrimination?

Secretary **Weinberger**. Yes. I don't want to get into semantics with you, whether it is specific or not, but we believe what we have put in the regulations was specifically—we were specifically directed to do as part of the general objective, or the general goal, rather, of issuing regulations designed to achieve an objective very broadly stated by Congress. This is one of the ways you can help achieve that objective, so we believed there was ample authority to do this.

As I say, the reason we did it was because we believed voluntary enforcement and provisions that focus on voluntary enforcement and more or less direct the colleges to get enforcement of this kind of their own are preferable to setting up a large Government police force to go in and gather its own data and do its own rather rigid enforcement.

Mr. **O'Hara**. While I am going on to the next question, Mr. Secretary, I am going to give your counsel something to think about. I would like to know, or I am going to ask you before you conclude, whether or not it would have been within the power of the Department to issue the regulations I have questioned if the Congress had not included in the law the first two sentences of section 902?

Secretary **Weinberger**. What are the first two sentences?

Mr. **O'Hara**. Well, let him think about it for a minute or two, and I will go to another question, if I can.

Secretary **Weinberger**. Do you want me to do it now?

Mr. **O'Hara**. No. Let's go to the next question.

Secretary **Weinberger**. I would like to say, Mr. Chairman, that some very substantial, favorable comments came in during the comment period for these two provisions. I don't know if you feel it is relevant or not, but it is sort of unusual.

Mr. **O'Hara**. No, I think I would have appreciated, as a matter of fact, if you fellows came back to us and said, "We think you can improve the law by including authority to require grievance procedures."

Secretary **Weinberger**. That is another of our difficulties of opinion. We felt the grant specifically included this kind of provision.

Mr. **O'Hara**. I think institutions ought to have grievance procedures. The institutions to which I am the closest, indeed, have such procedures, and I think it is unfortunate that the Congress didn't include it in the law. But we know our differences on that subject.

Let me ask you about subpart (E), the whole subpart (E). Here, you are dealing with a subject—subpart (E) has to do with discrimination on the basis of sex in employment, in education programs, and activities.

Now, here, you are dealing with a subject, Mr. Secretary, where the Congress specifically, in title IX, provided another method of dealing with employment practices. You told me—well, you see, in title IX, we wrote in the provisions that we are now discussing and we also wrote into the law an amendment—an amendment of the EEOC law, equal employment opportunity law—which repealed the exemption granted to educational institutions under that law.

It seems to me that the clear intent of what the Congress did, looking at the whole of title IX, was to determine that it wished to have employment questions in educational institutions, discrimination questions, handled under title VII of the Civil Rights Act of 1964, the equal employment opportunities title, and I wanted to know where you found the warrant to go ahead and insert a dual system of regulation of employment practices by inserting yourself into it in an area where the Congress had specifically dealt with it in another way?

Secretary **WEINBERGER**. Mr. Chairman, we don't think there is a dual system. We also don't think you have to hunt for aids to construct or look at title VII or legislative history, when you have plain language. We feel we have very plain language in section 901. It states: "No person shall be discriminated against in, or be excluded from, or be denied participation in a federally assisted program, or activity, on the basis of sex."

We think it is a broad provision. We think that employees participate in educational programs and activities receiving Federal financial assistance and are protected by 901, and you don't have to look any further. You only have to look for those things when you have a cloudy or ambiguous provision.

Section 901 strikes me as one of the few perfectly plain provisions.

Mr. **O'HARA**. Well, during the debate, though, Mr. Secretary, there were a number of references to this and I am going to dig them out—but in the meantime, perhaps we can return to the question I asked, which was, whether or not the Department would have felt that it had authority to prescribe grievance procedures, to prescribe self-evaluation procedures, under this statute absent the first two sentences of section 902?

Secretary **WEINBERGER**. I will now get a chance to read these in the specific connection.

The first two sentences—well, you are asking me, I guess, Mr. Chairman, whether we could issue regulations if the Congress had not put in language telling us to issue regulations?

Mr. **O'HARA**. Or whether you could have issued—well, in other words, when I questioned your ability to issue the specific regulations dealing with grievance procedures and self-evaluation, you bottomed your justification on the broad grant of authority to make regulations contained in the first two sentences of section 902. So, now, I am asking if the Congress had not included the first two sentences of 902, would you have felt you had authority to make those same regulations?

Secretary **WEINBERGER**. Well, I don't know. That is a pretty hypothetical question.

I didn't examine it, because we had what we felt was a perfectly clear direction. If you suggest that you repeal those first two sentences do we have that authority, I would want to research before I gave you an answer, because I haven't looked at it at all. But the only question I looked at was whether there was authority in the act, and I found it. And our attorney found it, and I have been advised our conclusions were correct. And we included it.

If you repeal the language, then, of course, the question would be: "Is there general rulemaking power absent a prohibition that would enable us to do it?" I don't know. I would like to spend time doing research before I give you an answer on it.

If you put a prohibition in against regulations of any kind, then I suppose we would have a fairly clear answer on the other side. I have not done any examination of that little question because it is entirely hypothetical. The simple fact is, 902 does direct us to issue regulations to carry out objectives of the statute.

Mr. O'HARA. Well, Mr. Secretary, I do find that a very important question, because we have been discussing here the ability of the Congress to limit the rulemaking authority of the executive branch. That is central to our entire discussion that is intended here today and earlier by letter communication between us.

Secretary WEINBERGER. Yes.

Mr. O'HARA. And you have stated you believe, (1) that the kind of broad grant of authority contained in 901 would justify regulations of this sort, which I complained of. (2) if Congress specifically prohibited you from issuing regulations, that that would have precluded you from doing it, then, I think the answer to the question I pose is very important.

Secretary WEINBERGER. We will be glad to do research on it. I don't see the relevance, because it is not before us. But I would not like my hestitancy on that point to deter me from giving an answer, but what I say is, I never considered it to be relevant or highly hypothetical. I have not considered it prior to this time, but I will be glad to do so. We have people here today who may be glad to give you their preliminary views on it.

My own view is, since there is a clear directive to issue regulations, which we tried to do, that that is as far as I pursued the subject. I didn't pursue the idea of what might happen if you had not included that.

Mr. O'HARA. I would like to ask if counsel is prepared to give a preliminary, tentative observation on it. I would like to hear it.

Mr. RHINELANDER. As the Secretary indicated, we relied on section 902 for authority for this. If it was deleted, it seems to me, the question would be, if title IX is viewed as an amendment to the Higher Education Act and the Elementary and Secondary Education Act, whether there is rulemaking authority in those other acts that would provide us with the legal authority to do this; we have not examined that question.

Clearly, it would be a more difficult question. I think, where the authority is here, in this specific act, and we are given rather general authority to issue regulations, not only authority, but we are directed to issue regulations consistent with the objectives, I think we would look simply at the question that was before us at the time. It would be more difficult, certainly, without this provision.

Mr. O'HARA. I would like to have a memo from you, if I could, because that is one of the ways the Congress might approach this whole problem. I want you to know we have not made a final decision as to how we are going to approach the problem. We are looking at it in terms of 431(d) and also in terms of amendments to the law.

I, for one, am uncertain at this stage in the proceedings before having discussed it with my colleagues, whether the regulations proposed with respect to intercollege athletics, as an example, are amendable to the 431(d) process, or whether it would be more appropriate in that case to come up with an amendment of the law, because there is some question about that.

I don't think there is the same amount of question about some of the other regulations I brought to your attention. For instance, subpart (E), which I think in this particular case, if one had looked to the intent of the Congress, where the Congress provided a specific remedy in the same statute for employment discrimination, that then to find a second remedy that was not explicit, but implied, presumably, is a violation of the congressional intent. I want you to know I feel that very strongly, and I am awfully sorry I took so long to discuss this with you, because other members of the committee wish to do so. I am going to yield, at this point, to the gentleman from Pennsylvania, Mr. Eshleman.

[Mr. Rhinelander later submitted the following further response:]

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
OFFICE OF THE SECRETARY,
July 3, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, Cannon House Office Building, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During Secretary Weinberger's testimony before your subcommittee on June 26, you requested that we provide you with a formal statement of our view on the following question: Whether, if the first two sentences of section 902 of Title IX had not been included in the statute, the Department would have had legal authority to promulgate regulations to effectuate title IX. At the hearing, the Secretary and I both indicated that we had not considered the question previously, since we believed the existing language in the statute provided ample authority for agency rulemaking. That language in section 902 provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, *is authorized and directed to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability* which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. [Emphasis added.]

Your question, essentially, has three parts: first, whether if section 902 as originally enacted had not contained the above-quoted language, the Department would have had legal authority to issue general regulations; second, whether under those circumstances, assuming the Department had had the authority to issue interpretative regulations, it would have had sufficient authority to issue provisions requiring self-evaluation and grievance procedures to be established by recipients; and third, whether if Congress amended secton 902 as it now stands so as to delete the above-quoted language, the Department would still have sufficient legal authority to issue general regulations.

(1) Absent section 902 language, authority for general regulations

Title IX, viewed strictly, is a free-standing staute not an amendment to existing law. Therefore, it is clear that, in the absence of the language just quoted, title IX would be devoid of express authority to issue any regulations. During the discussion at the hearing, I mentioned that if title IX were viewed as an amendment to the Higher Education Act or the Elementary and Secondary Education Act, those statutes might contain provisions which would authorize the promulgation of regulations. Although we have not had time to do an exhaustive study of all of the stautes involved, I am currentlly unaware of any such express authorizing language in those statutes.

Despite the absence of express language authorizing title IX rulemaking by the Secretary other than the existing language in section 902, I believe that the very existence of a Congressional mandate of the nature of title IX is sufficient to imply authority for the Secretary to effectuate the nondiscrimination provisions of the statute through issuance of regulations. The statutory language and its legislative history indicate that Congress viewed title IX as mandatory and that it anticipated the elimination of sex discrimination in federally supported education programs and activities by enactment of the statute. It is also clear that the Act is remedial legislation inasmuch as it is designed to correct and alleviate conditions adversely affecting persons on the basis of sex, and it is well accepted that remedial legislation should be broadly construed to effectuate its purposes. 3 *Sutherland, Statutory Construction*, 4th ed., § 72.05, p. 392 (1974). Therefore, I believe that even in the absence of express statutory authorization, the Department would have had the legal authority to promulgate title IX regulations covering substantive discrimination and procedures relating to investigations and fund terminations. This, in fact is the position the Department is taking with respect to non-discrimination with respect to the handicapped under section 504 of the Rehabilitation Act of 1973, which does not contain any explicit rulemaking authority.

Finally, regarding this first aspect of your question, if, despite the absence of the quoted language in section 902, Congress had enacted the so-called Javits Amendment to the Education Amendments of 1974, it would have been the Department's position that Congress had, in effect, ratified our implied authority to issue regulations. The Javits language, of course, reads as follows:

> The Secretary [of HEW] shall prepare and publish, not later than 30 days after the date of enactment of this Act, proposed regulations implementing the provisions of Title IX . . . which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Thus, by enactment of statutory language ostensibly limited to mandating a time-limit to agency action by directing the Department to publish regulations "not later than 30 days after" passage of the Act, Congress itself assumed the existence of legal authority sufficient to support that agency action.

(2) *Absent § 902 language, authority for self-evaluation and grievance procedures*

The legal authority of the Department to require that recipients of Federal financial assistance undertake a self-evaluation and establish grievance procedures is, in my view, a more difficult issue in the absence of broad rulemaking authority such as section 902, or section 602 of title VI of the Civil Rights Act of 1964, which explicitly provide for rules of general applicability. For this reason we probably will not propose similar internal procedures in our notice of proposed rulemaking under section 504, but, instead, specifically invite comments on this point in the preamble.

(3) *If Section 902 language were deleted now.*

If Congress were to amend title IX as it now stands so as to delete the quoted language from section 902, this action would strip the Department of all express authority to issue substantive rules or regulations. The full effect of such a step cannot be considered in the abstract and would have to be analyzed in light of the legislative history. In keeping with general principles of administrative law, however, such action might, nevertheless, leave authority for the Department to issue interpretative regulations and rules of procedure. As noted by Professor Kenneth Culp Davis, courts "often substitute judgment as to the content of an interpretative rule but almost always (theoretically always) refrain from substituting judgment as to the content of a legislative rule." (1 Davis, *Administrative Law*, § 5.03, p. 298 [1958]). Moreover, in this third hypothetical situation, there would, unless Congress also repealed the Javits Amendment, remain some inconsistency between the deletion of the section 902 language and the continued existence of the Javits provision.

With regard to rules of procedure, however, in light of the mandatory nature of section 901, I would assume that the courts would support the Department in their issuance as a legitimate, and indeed, constitutionally necessary action by the Executive Branch to carry out its responsibility faithfully to execute the laws.

I hope these comments will be of assistance to you and the other members of your subcommittee. If I or members of my staff may be of further assistance, please do not hesitate to let me know.

Sincerely,

JOHN B. RHINELANDER,
General Counsel.

Mr. ESHLEMAN. Thank you, Mr. Chairman. I am in no way criticizing the Chairman of the subcommittee; I would like to pursue his first question in a much less emotional manner. I want some clarification. I would direct my question to Mr. Holmes, if I could, and I am talking about the 3-year time frame. I can well understand a third year, the time of the third year. You spell that out on pages 2, 3, and 4 of the Secretary's testimony, but I have trouble seeing the first 2 years, the summer of 1972 and the summer of 1974. What took the time there?

You see, the reason I ask this, we come back on the 8th of July and by the 18th of July, we must give your Department some kind of answer. That is my understanding, and maybe it is not that hard and fast, but that is not an exaggeration. So, we will have 10 days after we come back from recess.

I am not being facetious, but what did you do in the first 2 years?

Mr. Holmes. Mr. Eshleman, I will be glad to respond.

As the Secretary's testimony indicated, we met immediately, well, in August 1972, with representatives of large numbers of organizations, educators, what-have-you, to discuss the recent passage of title IX, that summer. We sought from them their comments and what-have-you. We proceeded in the drafting process in the fall of 1972, and it was not, as you point out, until June 1974 that the regulation was issued in proposed form.

It simply took us that long to address many of the policy issues and other questions that we think arose and to draft the regulations. We met frequently with individuals during that period, and I might also note for the record—because I think that the record is somewhat unclear—that there has been no enforcement of title IX in the interim period.

In 1972, within months after passage of the statute, the Department informed educational institutions of the existence of the statute, of the statutory language in title IX, communications having been sent to the presidents of higher education institutions, chief State school officers, elementary and secondary school officials as well as vocational education officials.

Mr. Eshleman. Once again, I am not in any way being sarcastic, but was there any pressure on you, on the Department to have this done, to make the school year, or make it in effect by the school year September 1973 or September 1974?

There is going to be pressure on us to have final, whatever the final version is, but this September, and I don't see how we are going to do it. That is my personal opinion. I don't see how we are going to do it. If we would, in effect, tell you to redraft, especially in the athletic part of it, would you get it redrafted in time to get to get it back to us, to make the September school year this year?

Mr. Holmes. I don't know if I can respond. I might ask Mr. Rhinelander to respond. But let me note, if I can go back to your earlier question, Mr. Eshleman, there was a very basic decision made by the Department after passage, as the Secretary notes on his first page. That was to develop comprehensive regulations and to try to give notice to educational institutions as to their specific obligations and to avoid further individual ad hoc decisions of a policy nature.

The regulation reflects, I think, a great deal of work and represents an attempt to address what we viewed as the specific obligations contained in title IX.

John, do you want to respond to the other part?

Mr. Rhinelander. I would like to make two points, just picking up from what Peter said. I think the Department certainly could have issued a general regulation, almost repeating the language of the statute initially. A decision was made, and I think a correct decision, that it was much better to work out a comprehensive set of regulations that would give notice to all of the educators and institutions what was required under title IX. Obviously, it takes time because of the detail of the regulations.

Now, with respect to your earlier question, any amendments to the regulations we would issue in proposed form for comment, assuming that minimum comment period of 30 days, and then some turnaround time, after the comments were received, to issue the regulations in the final form.

We would then have, under 431(d) submitted the regulations to the Congress for a 45-day waiting period. Now, the Secretary has indicated the constitutional problems we had with the concurrent resolution, but there is no question that a 45-day waiting time is constitutional so it would delay the effective date 45 days from whenever we got the final regulations published in the Federal Register.

The specific answer is, I don't think there is any way we could issue amended regulations prior to the start of the school year.

Mr. **Eshleman**. All right.

Now, to change gears a little, and this may not seem of too much import, but believe me it is out in our district, we still have—I am referring now to sports—we still have quite a few alumni, who on their volition cared to give large and small donations to the football team of their alma matter, which goes for scholarship purposes, for football players, we all know what it goes for, what would title IX regulations do to that? Could that money still be used for the purpose that the alumnus might intend it to be used for?

Secretary **Weinberger**. I think so, Mr. Congressman. I don't see anything that would bar that from continuing. There will be additional efforts by institutions not required before to eliminate discrimination against women in athletic programs. There is no way in which you can cure or eliminate discriminatory practices that have been practiced in the past, consciously or unconsciously, and nearly always it was unconsciously in these cases. That does not mean the institution cannot continue to accept through whatever form they wish to pass it, funds for scholarships. It means there will have to be additional efforts made by the institution with respect to availability of scholarships for women in that instance. There is nothing to prohibit them from continuing to accept scholarship funds from interested alumni to persuade various young men to go on football teams.

Mr. **Eshleman**. And those funds, given with the specific intention by the donor, would not be considered discriminatory, in your opinion?

Secretary **Weinberger**. No; they would not. I think it is fair to tell you that additional efforts would be required by the institution that had not been required in the past.

Mr. **Eshleman**. May I interrupt you there; you mean with other moneys?

Secretary **Weinberger**. That is correct.

Mr. **Eshleman**. I would agree with that.

Secretary **Weinberger**. That is my view of it.

Mr. **Eshleman**. Thank you.

Mr. **Buchanan**. Will you yield?

Mr. Eshleman. He has a meeting, so I will yield.

Mr. Buchanan. Thank you.

One of our colleagues who is on the board of trustees of a university, expressed in earlier testimony concern about the housing provisions of the regulations, in that they have a policy of providing extra security for women's dormitories because women tend to be more subject to molestation and it is the university's decision that there is a greater need for protection in these cases. It was their feeling they would be precluded from providing that extra protection. Under the regulations they would have to either supply equal protection for men's dormitories or reduce the protection for women's dormitories.

Secretary Weinberger. I would hope that there would not be any mechanistic interpretations of that kind. I don't see anything—first of all, there would have to be a challenge raised by men to the effect they were not getting as much security as provided in women's dormitories and there would then presumably have to be some interpretation made.

My own view at this point would be that that situation is hardly likely to arise, and I would certainly suggest that if any university wishes to provide additional security for the housing that they continue to do so for women's housing. In a sense, excuse me, sir, in a sense we are sort of all guessing, because ultimately if someone wants to pursue something like this up to the courts, that is the only place we can get a definitive answer.

To the extent I would have anything to do with it, I would simply take the position that if I were asked for an interpretation that the university concerned could of course continue to provide that additional security for women's dormitories if they maintained separate housing. If some men's group wanted to challenge it, I would be prepared to make a pretty good argument as to how it was not discriminatory, but I can't give a more definitive answer.

Mr. Buchanan. I appreciate your response.

As to your testimony, I understand it is your intention to follow the intent of Congress.

Secretary Weinberger. Certainly.

Mr. Buchanan. If we legislate specifically, concretely, and clearly enough, we can count on you to do whatever we say?

Secretary Weinberger. Absolutely. All we want is full direction, and when you gave it to us with the Girl Scouts and Boy Scouts, we incorporated it immediately and indeed pleaded for you to do it. We are not only appreciative and willing to do it, but the record should be absolutely clear when we get congressional direction in legislative form, we will follow it every time.

Mr. Eshleman. Thank you.

Mr. O'Hara. The gentleman from Illinois.

Mr. Simon. Thank you, Mr. Chairman.

Mr. Secretary, first of all, I wish you well in your tenure. I don't know how many more days you have in office, but we hope we don't make it too rough during these final days.

Secretary Weinberger. I expect to work right up to the end.

Mr. Simon. While I differed with you from time to time, I think you served your country well and I applaud that service.

Secretary Weinberger. Thank you, sir.

Mr. Simon. On the question of congressional intent, if I may differ with you slightly here, it seems to me that you are suggesting that the

Executive ought to be able to veto a clarification of the congressional intent?

Secretary WEINBERGER. No, sir. I don't want to interrupt you, but all I am saying is that a clarification of congressional intent, our lawyers tell us, the Department of Justice, and it is also my own feeling, should follow the same basic procedures set forth in the Constitution for enactment of a statute. We find it hard to see how a statute can be modified or, as you say, clarified, given the court cases that say the small weight that is given to later attempts to explain in committee reports or whatever, in some nonlegislative procedure the actions of an earlier Congress, all we say is we would further muddy the situation if the change in the statute or the clarification, if you want to put it of the statute, or reinterpretation, any way you want to phrase it, does not follow the same procedure in the Constitution for enactment. If it does, we have no quarrel with it, and that is the way the Boy Scout-Girl Scout exemption came in. If it does not, we would have to challenge it because it is the view, I am advised, of the executive branch, that an attempt to change the statute by concurrent resolution is not constitutional, and we have that statement of the Department of Justice which we would like to put in the record and our memorandum to cover this, the legal response we take on this position. It is not a defiance of Congress or anything of the kind, but desire to get clarification that settles the matter once and for all.

Mr. QUIE. Will you yield?

Mr. SIMON. Yes.

Mr. QUIE. The President signed the law into which Congress wrote the authority for itself to deny, or to reject the regulations.

Secretary WEINBERGER. There was a signing statement, Congressman Quie, and we have been directed and ever since, have, with every regulation we have transmitted, called the attention of Congress to the challenges of the constitutionality of this section. We don't have the item veto, and sometimes it is necessary to get a large bill to accept provisions which are not agreeable, and as you know, those are handled with a signing statement.

Mr. QUIE. Thank you.

Mr. SIMON. I would hope we could work this out without a great deal of legal paperwork, and my personal position would be in opposition to that stand.

In general, I think what you have done in title IX is good despite the picture here, and if I might cite two statistics that hit me during the course of the hearings. One is that Ohio State University athletics have received all of the attention and the expenditures are 13-to-1 on males versus females, and in the area of school superintendents out of 13,000, there are 65 that are female. So the need for something along this line is very clear.

One thing struck me in a statement you made on page 5 as I glanced through the rules and regulations. I know of a medical school that now is discriminating in a compensatory way to make sure that there are women in the medical school.

Now, as I read 86.21 in your admission policies, that would not be legal; is that correct?

Secretary WEINBERGER. 86.21. You raised obviously a difficult point, one which the Supreme Court came close to addressing but did not, and this is the question of inverse discrimination, the question of whether you can practice discriminatory practices to redress the balance or makeup for admitted discrimination in the past, or whether inverse discrimination simply breeds more discrimination and is the wrong way to correct it and so on.

That question has not been determined by the courts. The basis of this regulation, which gives, as a prohibition, the giving or preference to one person over another on the basis of sex by ranking applicants separately on such basis or otherwise is an attempt to prevent the kind of discrimination that existed primarily against women in the past.

Frankly, I can't answer you as to whether that prior history of discrimination would be sufficient to justify a discriminatory practice, inverse discriminatory practices in the future.

The regulation attempts to prohibit any kind of discrimination in this particular area and, read on its face, it would certainly sound as if it would block an attempt to give a special preference which attempted to invert discrimination even though it was trying to make up for discrimination in the past.

But the ultimate answer to that would have to come from the courts and it is one of the major questions that will have to be addressed in the future.

Mr. SIMON. I mention that simply because it does seem to me that it is not an unreasonable policy for some schools to have some compensatory admission policies. Perhaps the regulation should be modified, at least to permit some flexibility so that the courts don't say not on the basis of the statute, but on the basis of your regulations, that compensatory admission policies are not within the framework of the law.

Secretary WEINBERGER. That is certainly a possibility. The dangers of inverse discrimination to my mind are very great and I have real worries as to whether you can ever cure discrimination by having more discrimination. This is a rather fundamental point.

Mr. O'HARA. Will you yield to me for a minute?

Secretary WEINBERGER. Well, first, Mr. Holmes calls attention to section 86.3(b) of the regulation which says in the absence of a finding of discrimination on the basis of sex, a recipient may take affirmative action to overcome the effects of conditions which resulted in limited participation.

Then it goes on and says, nothing herein shall be interpreted to alter any obligations, et cetera, which a recipient may have under Executive Order 11246.

Ultimately the *De Funis* case, or something like it, will have to be decided, and we will know. I am perfectly willing to give you my opinion why you don't cure discrimination by inverse discrimination.

Mr. O'HARA. Will you yield to me, Mr. Weinberger. I was waiting for you to say something I could agree with wholeheartedly.

Secretary WEINBERGER. It is only an hour and a half, Mr. Chairman.

Mr. O'HARA. And I wanted to compliment you for having arrived at that decision and I think that is a view of the majority of the Congress and I just wish your regulations reflected it.

Secretary WEINBERGER. I think they do.

Mr. O'HARA. I don't think they do because the section you just read specifically authorizes it—it says that "Regardless of the fact that the standard says that nothing shall be interpreted to require" and so forth, that it is OK if they do it, it is they may do that if they wish to.

Secretary **Weinberger**. The last clause I read to Congressman Simon, I think, is important and that says there is nothing in this that gives you a right to violate your basic obligations, which is not to discriminate.

Mr. **Simon**. If I may disagree both with my chairman and the Secretary. I see nothing wrong with the school providing some, whether it is in the field of women or in the field of race or other areas, providing some compensatory regulations.

Mr. **Quie**. Will you yield?

Mr. **Simon**. Yes, Mr. Quie.

Mr. **Quie**. The question that comes to my mind deals not with women or race, but rather with men. If a school now had an admission policy, the result of which would enroll an equal number of men and women, but, in so doing would set a higher standard for women than for men, it would be prohibited by the regulations, so you will end up with an imbalanced institution, which we are supposed to try to prevent in the first place. You permit an institution now, under the Civil Rights Act, to have lower standards for individuals on the basis of race, but it seems you are going to prohibit the lower standards on the basis of sex because it is the male sex that would have the lower standards for admission than the female sex.

Secretary **Weinberger**. Congressman Quie, first of all, I don't agree with you that we permit lower standards on the basis of race or color. There have been some attempts to put that into effect and we had the cases and the discussion I had with Congressman Simon relates to that point.

But with respect to the admission of men and women in institutions that are not exempted by the statute, and there are a few that are exempt, but in areas not exempted by the statute, I don't see any other way to draw regulations, or to comply with the statute, than simply to say that both sexes have to be treated equally.

If you have more male applicants, which I take it is your point, or an institution adheres to a practice under which male applicants are admitted who meet less stringent requirements than female applicants. I would certainly have to say that kind of practice would not be allowed either by statute or regulation or by any regulation that could be validly drawn.

Mr. **Quie**. Are you saying you are not permitting lower standards for people of minority races of admission?

Secretary **Weinberger**. That is not covered by this regulation. I am saying that to the best of my knowledge, there are some institutions which may do that, but we do not either encourage or authorize that, nor should we, in my opinion, in our other enforcement. But what this particular—well, I know you are talking about open enrollment and that kind of thing, but that is done by individual institutions. But in the matter that is before the committee this morning, with respect to these regulations, I see nowhere within title IX, nor would I think it desirable, for any authorization of any different standard of admission based on sex.

Our regulations don't authorize it and I don't think any regulation could unless you want to change the statute specifically to authorize it and if you did I would think there is a highly dubious constitutionality question to it.

Mr. QUIE. Let me ask you, will you pursue as aggressively the removal of lower standards of admission for people of minority races as you will the prevention of setting lower standards for the male admissions?

Secretary WEINBERGER. I would, but I don't think it is relevant to the hearing this morning. That is a totally different point in the courts in a number of different situations and ultimately will have to be resolved by the courts. What is before us this morning is a very specific statute and some regulations that attempt to carry out that statute. That is what we are trying to do.

Mr. QUIE. I think it is very relevant.

Secretary WEINBERGER. I don't see any basis in this statute before us this morning to authorize different admission standards and lower standards for men than women or making higher more stringent requirements for women's admissions. If it were in the statute, I would think it would be unconstitutional.

If you want to carry it further, do I think the same thing with respect to admissions by race, the answer is yes, but it is a different set of circumstances and is not before us this morning and is in the courts.

Mr. SIMON. I have one final point and I address it really to the committee rather than to the witness.

I discussed briefly with the staff and with the chairman of the committee that I hope somehow we can, instead of saying we do not accept title IX because of, and then you have to resubmit and then we then OK the balance, that we could say, we accept title IX except for, and so that, and section so and so which needs to be modified, so we could take affirmative action and the balance could go into effect immediately.

Secretary WEINBERGER. I couldn't answer that, but I suggest to you there is a simpler solution. That is just to allow the regulations to go into effect and try them for a while and see if some changes are indeed necessary as the experience is built up.

This is, needless to say, a very complicated field. It has taken us too long, as has been expressed by the committee, and I would suggest that the Congress might have somewhat the same kind of problem if we tried to write the regulations here or if we tried to deal with them on an individual piecemeal basis.

What we would suggest and urge very strongly in all seriousness is that you let the regulations as drafted after this long travail and attempts and comments and everything else, to go into effect and then if you find there are problems with specific things, those could be addressed by statute or by requests for additional regulatory action.

Mr. SIMON. Well, I don't find your suggestion totally offensive. On the other hand, it seems to me what we are doing here is legislating and if the committee as a whole finds certain portions of it need clarifying or if, for example, there are a couple of paragraphs that need a substantial bit of modification, I think that the committee has the responsibility to move in that direction. But I hate to see us take a negative stand, on the whole, because of a disagreement with a few paragraphs and that is a procedure I hope we can avoid.

Mr. O'HARA. If I could just respond to the gentleman from Illinois, the issue he raises is one that has been raised several times by members of the committee informally during the process of these hearings. We are having a legal memorandum prepared on the subject, and we will take that up at our first session following our return here after the Fourth of July vacation, the question of just what sort of options are available to us in a legal sense under 431. We will try to do it in as sensible a way as is consistent with the law.

The gentleman from Minnesota.

Mr. QUIE. Thank you, Mr. Chairman.

I gather, Mr. Secretary, from your testimony, and it has been suggested by other witnesses that have appeared before us, that title IX should be administered in a manner identical to the enforcement procedures under title VI of the Civil Rights Act.

The Supreme Court, however, has not yet identified sex as a suspect class under the equal protection clause of the 14th amendment. Wouldn't this indicate to you that legally title IX cannot be enforced with the same full force and effect as title VI of the Civil Rights Act?

Secretary WEINBERGER. I don't quite get the import of your question, Congressman. Are you asking me to predict what the Supreme Court would say?

Mr. QUIE. No, no. The question is how do you interpret the meaning of what the Congress has done in the area of sex discrimination, as opposed to race? I imagine when you enforce the law you also take into consideration the law as it has been interpreted in light of court decisions. The court has defined race as a suspect class, but they have not done that with sex. Evidently the court feels that under the Constitution there is a difference between individuals on the basis of sex and not a difference on the basis of race.

Secretary WEINBERGER. I suggest the only reason they have not is the question has not been presented to them yet. I am not aware of any specific holding by the court that sex is not a basis for protecting or for special categorization by Congress. I am not aware of any adverse ruling.

I suspect that the reason that there has not been a ruling is it simply has not yet been presented. I suppose in light of the comments we had in connection with these regulations, that there probably may be a test made. I don't have any reason to suppose it would go the other way.

Mr. QUIE. Well, I will send you some of the cases like *Reed* v. *Reed*, and then get your reaction as you look at those.

Secretary WEINBERGER. All right, sir.

Mr. QUIE. The next question I have is in conjunction with what Mr. O'Hara has asked you. We received testimony that except for regulation authority under Executive Order 11246, the Department does not have jurisdiction over these actual regulations of employment in education institutions, don't you think that if the Congress intends the employment provisions to be administered by EEOC, that they can handle it as adequately as the Department of Health, Education, and Welfare?

Secretary WEINBERGER. That is a totally different question than the legal responsibilities that are imposed. I would be the last person to say, or I should not even be asked whether we should do something better than anybody else because, of course, I will tell you we will, because I am very supportive and admiring of the people we have that work in these fields, and I think we would do a better job than anybody else.

But that is not the reason why we have done this. What we have done is try to follow what we believe is the plain meaning of section 901. When you have a plain meaning, you don't hunt for legislative aids or intent, or anything of that kind but follow the plain meaning of the words. That is one of the oldest of the canons of statutory construction. That is the situation we believe we have here.

Mr. QUIE. I don't think that the meaning is clear at all.

Secretary WEINBERGER. Well, when it says, "No person shall be discriminated against, in, or be excluded from or be denied participation in a federally assisted education program or activity on the basis of sex," I don't see any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class, I don't see any reason for excluding employment under 901. If the Congress wants to exclude employment, it is the simplest thing in the world, but when you say "no person," there is no room for us to argue any other intent.

Mr. QUIE. What we did is to give responsibility to EEOC feeling that the executive branch would understand when we did it that we did not expect both HEW and EEOC to handle it.

Secretary WEINBERGER. We are not seeking additional duties in our Department, but trying to divest ourselves of some we got, and we urged several programs to be abolished unsuccessfully, unfortunately, but we are not trying to get additional duties.

We don't see any way to read that language any other way. But if Congress believes that employment should be excluded and handled separately, the simplest thing in the world to do is say so.

But when you say "no person" without exception shall be denied the right to participate and so on, and when you have to conclude that employment is a participation, you can't argue that any way that I know of, then I don't see any other conclusion you can come to.

Mr. QUIE. Well, if we do come to a different conclusion and the decision is made here on the resolution that you do not have authority to enforce that part, would that in any way delay implementing your regulations?

Secretary WEINBERGER. I think any change in the regulation of any major kind would require republication and public comments and everything else. I would be surprised if very few people would want to comment on this, and I would assume there would be that kind of delay, and what I suggest if Congress feels this way you put a specific exemption into this section of the statute so that we do not have any longer the plain meaning that we read into 901, and I, frankly, don't see any other way we can read that section.

Mr. QUIE. We thought it was clear the way we had written it, but I recognize now we may have to put in specific exemptions.

Let me ask you then, is my understanding correct that you did call some groups in, the interested parties all over the Nation?

Secretary WEINBERGER. We did.

Mr. QUIE. Did you at any time bring the principals in the Senate and House who were responsible for the drafting of this legislation and sit them down together to talk about what was meant?

Secretary WEINBERGER. Mr. Kurzman can answer that, because he does do a great deal of that briefing. My impression is we did make substantial efforts in that direction.

Mr. KURZMAN. My understanding is, Mr. Quie, we did offer briefings rather consistently.

Mr. QUIE. I don't mean briefings. I mean did you bring them in to ask what their intent was, since you felt it was unclear.

Mr. KURZMAN. We were taking comments. In fact, we had rather extensive briefings in one room in this building at the time for Members of Congress and the staffs, as I recall, and the staff did attend, in which we made extensive notes on comments made to us about what was expected.

Mr. QUIE. Is this after or during the period?

Secretary WEINBERGER. No; I think it was during the period, but the problem here, Mr. Quie, is, you say "to find out what the intent of the Congress is." On this matter at least and many other matters, the Congress speaks with many tongues, and the only way it can speak is with an enactment.

We have two authors, Mrs. Green and Senator Bayh.

Mr. QUIE. I mean bringing them together in the same place to have an exchange. You sought advice of people all over the Nation.

Secretary WEINBERGER. We tried to get as wide a public input as we could and that included briefings and discussions with Members of Congress and Members of the Senate.

Mr. QUIE. I am one person who took part in the drafting of the legislation and I don't recall being invited to sit down with Mrs. Green and Senator Bayh, or with people of your Department to try to figure out what the intent and meaning was.

Secretary WEINBERGER. I think you would agree, if you had the responsibilities we have, that that is a pretty impractical process because if you don't have 435 and all 100 present, you run a serious risk, and the procedures we establish are the ones we are engaging in this morning.

Mr. QUIE. You do feel it is important to bring in everyone else who might be interested in the country, but not the Members of Congress who pass the legislation.

Secretary WEINBERGER. There was no discriminatory or exclusionary process, and we tried to include everybody, and we asked for comments and got a lot of comments from Members of Congress in the normal comment period.

Mr. HOLMES. Mr. Quie, may I add something for the record, please?

I was just asking Ms. Gregory, with regard to the employment coverage issue, and the 10,000 comments that were received by the Department on title IX, it is our best recollection that not one suggested that employment coverage was going to be excluded from title IX. I don't recall ever hearing that in our discussions with staff members on the Hill until today.

So, I just wanted the record to be clear in that regard, that this is the first time that issue has arisen.

Secretary WEINBERGER. Ms. Gregory conducted each hearing in all of the 13 cities all over the country, and did this point come up?

Ms. Gregory. No; it did not. As a matter of fact, we met with Ms. Kuhn and she didn't bring it up either, so it is new to us, the whole issue.

Mr. Quie. The first time she brought it up was in her testimony yesterday?

Ms. Gregory. Yes.

Mr. O'Hara. Maybe they moved too hurriedly on the regulation.

Mr. Quie. Yes.

I look at Mrs. Green as being the major author of this on the House side, and she stated November 27, 1974, on the House floor, "When funds for athletic departments come out of Federal grants, fees, and tax dollars, women students are to have equal opportunity with men, but intercollegiate sports financed by gate receipts is an entirely different matter and not covered by title IX."

Secretary Weinberger. I didn't hear the source.

Mr. Quie. Mrs. Green, former Member of Congress from Oregon.

Secretary Weinberger. Is this a floor debate?

Mr. Quie. Yes. So I therefore assumed that what she said was available to people in the Department.

Secretary Weinberger. One voice out of the 435, and the 100, and it is opposed by a number of other voices, and Senator Bayh didn't seem to have any question, and he is one of the other authors.

Mr. Quie. Did Senator Bayh say specifically he felt that intercollegiate sports should be governed in this way?

Secretary Weinberger. I don't know. My impression is he did. He certainly, to my knowledge, never said they should not be. There is much more conclusive action than that, the Congress, as a whole, in accordance with the Constitution, adopted the Javits amendment which directed us to include athletics.

Mr. O'Hara. Will you yield?

I just wanted to take up the question that Mrs. Green was 1 voice out of 435.

The Secretary is a good lawyer, and he knows that in interpreting statutes, one looks at the committee report and conference report and remarks made in debate, and that one is directed in his attention to the remarks made by the bill manager, by the person in charge, and by the person, or the offeror of an amendment, more than to any other single Member, so I am sure you didn't want it to be understood that Mrs. Green's remarks made in debate would have no more weight than those of any other Member, because she was both bill manager and author of the title IX provision.

Secretary Weinberger. The rule you cited, Mr. Chairman, if I might say so, is a rule which applies to remarks made concurrent with passage, and not considerably afterward when a question has been raised.

The other point is totally aside from that, that is legislative intent that you try to reconstruct. Here you don't have to because the Congress, as a whole, not by any discussion on the floor or anything, but simply by the constitutional process of legislative enactment, directed us to include intercollegiate athletics.

Mr. O'Hara. Well, I grant the first part of your statement. I think it—I think the second statement is different. Now, you know, that is a different question than the question Mr. Quie raised.

Mr. QUIE. But even in directing that intercollegiate athletics should be included it does not say what you ought to do with them. It merely says you ought to have regulations with respect to them.

Secretary WEINBERGER. I didn't hear you.

Mr. QUIE. I said the Javits language does not tell you what you ought to do with your regulations, but only says you ought to have regulations with respect to intercollegiate athletics.

Secretary WEINBERGER. It does not contravene Mrs. Green's interpretation, although I think Mrs. Green's interpretation is weakened considerably by the fact it was made not during the debate of the bill but later on.

Mr. QUIE. Another indication by Senator Bayh when he testified here, was that student assistance programs were not included as aid from Federal Government to the institution, He also stated to Senator Dominick on the floor that he felt that the legislation would not require you to withhold funds to an institution for student assistance.

How does that, or how do you feel that student assistance then becomes an activity or program to an institution of higher education?

Secretary WEINBERGER. I can only conclude he didn't have the conclusion of the court in the so-called *Bob Jones* case before him at that time, because, as we read that case, it clearly states that it is not the question of who is the payee. but it is the question of whether or not there is Federal assistance furnished. And Federal assistance furnished to a student who in turn uses it at an institution brings with it the same results as if you put the money directly to the institution. That is again a court case. It is a matter of legal interpretation, and probably could be overcome by Congress if they wished to do so, but has not yet been done.

Mr. O'HARA. Will you yield.

That is a district court decision, isn't it?

Secretary WEINBERGER. No; it has been affirmed by the court of appeals within the last month.

Again, I know this passes the immediate question, but what I don't see at this point is the desirability of excluding student financial assistance from the purview of this statute.

Mr. O'HARA. I am sorry, Mr. Quie.

Mr. QUIE. Let me ask you then, if an institution comes under your jurisdiction, because of the fact that student assistance was made available to a student attending that institution and that institution discriminating, would you then have the authority to sanction the cutting off of student assistance aid to students in that institution?

Secretary WEINBERGER. Would we have authority?

Mr. QUIE. To cut off student assistance aid to that student?

Secretary WEINBERGER. I didn't understand the question actually, Congressman.

Mr. QUIE. The activities or programs, Federal support to the institution that brings them under purview of your regulations, if you find that institution is discriminating, do you have then the authority the right to sanction, to cut off the supplemental education grants and national defense student loans?

Secretary WEINBERGER. I think you have to look at the particular statute involved. If you are talking about title IX and the conclusion is that student assistance brings the institution at which it is used under the general authority of the regulations, then I think the Federal financial assistance to that institution might well be cut off. I don't think you would take the student, or I don't think you would take the assistance away from the student who was denied admission, for example, or anything of that kind, but you would let him take it and use it somewhere where there was not a violation.

But a violation of title IX, as I understand it, subjects the institution doing the violating or the person doing the violating to a loss of Federal funds. That would be what we would have to look at. We would certainly not take enforcement action against an innocent student.

Mr. QUIE. What you are saying is that you would cut off the aid to the student if the student chooses to attend that institution?

Secretary WEINBERGER. No. No. What I am saying is if the student tried to attend an institution and, in violation of Title IX, was denied admission, for example, the institution, if it were guilty, after all of the procedures were gone through, would be in danger of losing its Federal aid. The student would be able to take his grant and try someplace else that didn't violate the law.

Mr. QUIE. Well, the student can't take his grant and try someplace else because SEOG and NDSL and work-study goes to the institution he attends.

Secretary WEINBERGER. They, I would say, go for educational grants which he does take with him and which we recommended to SEOG for a number of years.

Mr. QUIE. In any case, you would use it as a sanction for cutting off the aid?

Secretary WEINBERGER. Where there is a violation, the violator stands the risk of having the Federal funds reduced, but I would not consider that a student who is denied admission in violation of title IX was a violator. We would consider that the institution that denied him admission would be the violator and would be the one who would be subjected to loss of Federal funds.

Mr. QUIE. But their loss of aid is the student's assistance.

Secretary WEINBERGER. Well, if it is that particular kind of program, or what I am saying is, I think there are various kinds of Federal funds which can be withheld.

Mr. QUIE. I recognize there are various funds that can be withheld; but we interpret it in the limited way that it can only be applied to those programs and activities financed by the Federal Government, but you interpret it as meaning an institution that receives Federal aid to any program. In doing so you are going back to the language as it was written by the Senate, which was later dropped, and replaced by the more limited House language. I want to know how it is going to be handled because even Senator Bayh, the author in the Senate, has said it should not apply to student assistance. You say that it does.

Secretary WEINBERGER. We say that the court cases and the recent decision last month makes it quite clear to us the furnishing of student assistance to a student who uses it at a particular institution, Federal aid which is covered by the statute, and I don't see any other way to read the court decisions. If the Congress desires some different result and wants, for example, to encourage an institution to practice discriminatory practices in this way, with student assistance, then I think you have to say so.

At the moment we feel we are bound by the court decision which says that the furnishing of student assistance is part of the Federal participation that is affected by title IX, and covered by title IX.

Mr. Quie. When was that court decision?

Secretary Weinberger. Well, the district court decision was about a year ago. The court of appeals decision was last month.

Mr. Rhinelander. The date was May 28.

Mr. Quie. Does it apply to you, when the district court makes a decision, or when the court of appeals rules?

Mr. Rhinelander. This was a case involving the Veterans Administration in education programs under that.

Mr. Quie. But you say that it applies to you because of the court decision?

Mr. Rhinelander. I think the court decision conforms to the position we have taken, and this amounts to Federal assistance.

Let me go back to a point, address myself to a point you made, fund termination is not the only alternative we have for enforcement. In cases where the result might be to cut students off of financial aid, we would have the alternative of referring the case to the Department of Justice, and where they take action which might be in the form of a lawsuit seeking an injuctive remedy to prevent the discrimination and not go to the fund termination route.

Secretary Weinberger. That is true. There are other remedies and I thought you spoke specifically of taking funds away. There are a number of choices of remedies.

Mr. Quie. I know there are other remedies, but you come back to the final sanction of removing Federal funds, and you say that you would take out the Federal funds?

Secretary Weinberger. I am saying, Congressman, it is one of the available remedies. Of course, the easy answer is for the institution to cease the discriminatory practice that puts at risk their Federal funds, whether from student aid or research grants.

Mr. Quie. Take, for example, financial aid. Students for years have tried to have an even number of male and female students in the freshman class, are you going to prohibit them from doing that?

Secretary Weinberger. From doing what?

Mr. Quie. Making certain by means of their admission standard to get an equal number of male and female students in the freshman class.

Secretary Weinberger. I don't understand the purport of your question, but if we are back on that other subject, again, I don't see any way in which an institution can constitutionally or legally or properly have different admission standards for men and women.

Mr. Quie. Those institutions are going to have to change their admission policies this fall.

Secretary Weinberger. Well, there is always a cost to eliminating discrimination, and of course, some things are going to be changed. We are not telling you title IX does not require changes; of course, it does.

Mr. Quie. They are not eliminating discrimination, they are requiring that they have an equal number of both sexes.

Secretary Weinberger. I don't think there is any particular goal in having an equal number of men and women students. What is a goal is to create an increase in opportunities and the elimination of discrimination which involves a denial of opportunity.

We are not saying that each institution has to admit precisely the same number of men and women, but we are saying that there is no basis.

Mr. QUIE. You are prohibiting the institution from doing that as well.

Secretary WEINBERGER. We are not necessarily prohibiting anything, but what we are trying to prohibit, in line with what we understood was our direction, is discriminatory practices denying equality of opportunity. I don't see any way you can guarantee equality of opportunity if you want to insist on a lower admission for men and higher admission standard for women. I think that is constitutionally improper and morally wrong.

Mr. QUIE. Well, there are institutions that are going to have to change drastically.

Secretary WEINBERGER. They may well have to, but there are a lot of things that have to be changed if you pass a law like this. I can't understand a suggestion, bypassing a law like this, you are not going to require changes. Of course you are.

Mr. QUIE. Well, what I understood from the author in the Senate and others is that student assistance was considered to be aid to the student and not to the institution, as you had held all along evidently, and you would say that the court case now substantiates the view which you took originally?

Secretary WEINBERGER. Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of title IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is and base our assumption on that.

As Mr. Rhinelander says, the court case confirms this belief.

Mr. QUIE. Thank you, Mr. Chairman.

Mr. O'HARA. Mr. Secretary, I look at the decision in the case of Bob Jones University and I think as a matter of fact it is probably right, and I am very impressed by the weight that the Department gave to a decision of a district court judge in South Carolina, even prior to its affirmation by the circuit court of appeals. I know on some occasions that no such weight was given to the decisions of district courts or even circuit courts.

What especially pleased me was to discover the district court judge, the judge who rendered the decision was the Honorable Robert Hemphill, and it is apparent to me that "Old Bob" has gotten a lot smarter since he left the House of Representatives in order to have so much weight given to his pronouncements by the Department.

Secretary WEINBERGER. We were happy to find that he agreed with us, Mr. Chairman.

Mr. O'HARA. Well, Bob is a fine fellow, and a good judge, I am sure, but I am afraid if he were saying the same things from my position, you would not think it mattered at all.

Mrs. Smith, do you have some questions?

Mrs. SMITH. Yes. First, I would like to thank you for making a special effort to come here this morning, and I think you have rendered a distinguished service to our country in this capacity.

I would like to ask just one question. When Senator Birch Bayh first discussed this back in 1971, I remember his comment was that sex discrimination should not be allowed under any program or activity conducted by a public institution, but then when the law was passed, it said, "Any program or activity that receives Federal assistance."

Now, it seems to me, as you outlined the Department's policy, that it is an institutional approach dealing with any program or activity, and I do not see the point emphasized "receiving Federal assistance", and I would like to ask by what authority does the Department deviate from the language in the law?

Secretary **Weinberger.** Well, Mrs. Smith, I don't think we did. We certainly didn't intend to deviate. Generally, we tried to look as we normally would for guidance in interpreting language where we felt the language was not perfectly plain as we thought it was in the other section I mentioned.

One of the places you look for guidance is in the interpretation that the courts have given to similar statutes. Title VI, in the *Finch* case, was interpreted in a way that led our counsel to recommend to me and report to me, and this was later confirmed by the Department of Justice, that programs that have any educational value or any educational meaning are the ones that are covered regardless of whether the Federal funds go specifically to those programs.

In other words, if the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in title VI, and that is why we used this interpretation in title IX.

With specific reference to athletics, which is the point in which it usually comes up, this point became somewhat academic after passage of the Javits' amendment, which we thought very specifically included athletics.

But before that time, we did take this interpretation based on the interpretation of similar language in title VI, which was interpreted in the so-called *Finch* case.

Mrs. **Smith.** Now, as I understand that, this dealt with race rather than sex, and the Supreme Court has not delineated the same sanctions for sex and race?

Secretary **Weinberger.** That is correct. It has not. We tried to find guidance in the most similar language that we could in title VI, which is on the basis of race and not on the basis of sex, but it does have, we believe, compelling similarities that required this interpretation.

Mrs. **Smith.** Well, since the Supreme Court has not ruled on it, I wondered why you did not follow the language of the law instead of following this interpretation.

Secretary **Weinberger.** We did try to follow the language of the law, seeking for guidance as to what it meant in title VI, the most similar statute to title IX, and in court interpretations of that statute. If we are wrong, we would ask Congress to tell us so.

Mrs. **Smith.** If I may turn to the University of Nebraska, where I am better informed than in other areas; where we have a highly successful athletic program; where we do not receive Federal aid, and where we have one of the few programs in which football maintains the entire athletic competitive intercollegiate competitive program. Do you feel this would come under the guidelines?

Secretary WEINBERGER. I would feel, Mrs. Smith, if that situation at the University of Nebraska does get Federal funds in a number of different programs, and because of that and because of the interpretations we have been told we should make of title IX, that, therefore, their athletic programs would also be covered, even though their athletic programs do not get Federal funds specifically.

That is the point and it has been a matter of obvious contention and there are some people who disagree with us, of course. But all of that we thought was resolved when the Javits amendment was passed which overrode all of this and went specifically to the point of intercollegiate athletics and told us to draw regulations that were basically reasonable or some such language.

Mrs. SMITH. Do I understand correctly that because some of our students receive Federal assistance, you are interpreting this to mean that you can come in and regulate our athletic program?

Secretary WEINBERGER. The answer to that is we were interpreting it that way and prior to the Javits amendment, at which point it becomes unnecessary to rely on such things as title VI and the *Finch* case because we then had a specific direction to include athletics regardless of whether athletics received funds from the Federal Government, but because the Congress said to do so in title IX.

So we may have well been wrong before. We may well have been wrong before; I don't think we were but, if we were, it is academic now because, as we have this Javits amendment language, we believe it specifically requires us to include athletics, whether or not athletics get Federal funds directly.

Mrs. SMITH. Whether or not they get Federal funds?

Secretary WEINBERGER. Yes, and the language from which we cannot escape says:

> The Secretary shall prepare and publish not later than 30 days after the enactment of the act, proposed regulations implementing the provisions of title IX relating to the prohibition of sex discrimination in federally assisted education programs which shall include, with respect to intercollegiate athletic activities, reasonable provisions considering the nature of the particular sports.

With that language before us, all of our legal arguments we believed were correct became unnecessary because we had here a specific direction. That is the view we have taken.

Mrs. SMITH. Thank you, Mr. Secretary.

That is all, Mr. Chairman.

Mr. O'HARA. Thank you very much, Mrs. Smith.

[The Secretary subsequently submitted the following letter:]

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE.
Washington, D.C., July 2, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, Cannon House Office Building, U.S. House of Representatives, Washington, D.C.

DEAR MR. O'HARA: I am writing in regard to the hearing of June 26, 1975, conducted by the Subcommittee on Postsecondary Education, at which I testified and you presided.

The hearing was held to receive testimony on HEW's regulations implementing Title IX of the Education Amendments of 1972. During the course of my testimony two issues arose on which I would like to submit additional comment.

First, both Mr. Quie (pp. 6-75-76 of the transcript) and Mrs. Smith (pp. 6-96-97 of the transcript) pointed out that the Supreme Court, while applying a "strict scrutiny" test under the Fourteenth Amendment in the area of discrimination based on race, has not yet applied such a test in the area of sex discrimination. Both wanted to know if the Department had taken that fact into consideration in drafting its Title IX regulation. The cases apparently being referred to are *Frontiero v. Richardson*, 41 U.S. 677 (1973); *Geduldig v. Aiello*, — U.S., —, 41 L.Ed.2d 256 (1974); *Schlesinger v. Ballard*, — U.S. —, 43 L.W. 4158 (January 15, 1975); and *Weinberger v. Wiesenfeld*, — U.S. — (March 19, 1975). We did, in fact, takes these cases into consideration.

We would like to emphasize that these cases deal with sex discrimination under the Fourteenth Amendment and not sex discrimination under a specific act of Congress. When Congress specifically prohibits certain discrimination by statute, a higher standard may well apply than under the Fourteenth Amendment. In *Geduldig v. Aiello, supra*, the Supreme Court held that exclusion of coverage from the California disability insurance system of disabilities accompanying normal pregnancy and childbirth does not amount to discrimination under the Fourteenth Amendment. In subsequent cases, employers have challenged the contention of the Equal Employment Opportunity Commission that Title VII of the Civil Rights Act prohibits employment policies from providing sick leave benefits to employees for all temporary disabilities and sickness but not those due to pregnancy and childbirth. In all of these cases the courts have found that *Geduldig* is not controlling, holding that a higher standard is imposed upon distinctions based on sex under Title VII than the rational basis test applied to such distinctions under the Fourteenth Amendment. See *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975); *cert. granted*, — U.S. — (1975); *Communication Workers v. American Telephone and Telegraph Co.*, — F.2d — (2nd Cir. 1975); *Gilbert v. General Electric Co.*, No. 74-1557 (4th Cir., June 27, 1975); *Vineyard v. Hollister School District*, 8 FEP Cases 1009 (N.D. Cal. 1974); and *Satty v. Nashville Gas Co.*, 10 FEP 73 (1974). Although there are no cases specifically dealing with the effect of *Geduldig* or any of the other Supreme Court decisions cited above on Title IX, the reasoning involved in the Title VII cases is equally applicable to Title IX.[1]

The other issue which I would like to address was raised by Mrs. Smith (pp. 6-95-77 of transcript) when she asked what authority permitted HEW to take an institution-wide approach under Title IX rather than only covering those programs receiving direct Federal financial assistance.

The language of section 901 of Title IX, like section 601 of Title VI, speaks in terms of prohibiting discriimnation in a "program or activity receiving Federal financial assistance." The language of section 902 of Title IX, like section 602 of Title VI, provides that any termination of Federal financial assistance for failure to comply with section 901 "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been . . . found." (This is the so-called "pinpoint" provision.) However, although many activities such as athletics do not receive direct Federal financial assistance, discrimination in those activities may so affect other portions of an institution's education program or activity which are receiving such assistance that those portions of the program must then be viewed as being "infected by a discriminatory environment." *Board of Public Instruction of Taylor County, Florida v. Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969).

In *Taylor*, an administrative law judge concluded that a county school board was out of compliance with applicable HEW regulations and guidelines implementing Title VI, specifically finding that the school district's progress toward student and teacher desegregation in its elementary and secondary schools was inadequate and that the district was seeking to perpetuate a dual school system through its construction program. Based on these findings, all classes of Federal financial assistance were ordered terminated, including funding for adult education.

On appeal, the Fifth Circuit concluded that all Federal financial assistance could not be terminated without an express finding of fact that the funds being terminated were themselves being administered in a discriminatory manner or were so affected by discrimination occurring elsewhere in the program that they thereby became discriminatory. The court pointed out that Congress, in enacting education legislation, had not adopted "a comprehensive 'school program,' but adopted instead a series of projects each intended to reach specific areas of educational need." 417 F.2d at 1078. It therefore concluded that the language of section 602 which requires a termination to be "limited in its effect to the particular program, or part thereof in which such noncompliance has been so found . . ." refers to noncompliance in the use of funds made available under the Federal statute which authorizes the Federal financial assistance. This limitation, the court felt, was "for the protection of the innocent beneficiaries of programs not tainted by discriminatory practices." [Emphasis in original.] *Id.* at 1075. The court decided "that the purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute." *Id.* at 1078. It concluded, however,

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[1] This conclusion is supported by Sutherland's treatise which states the following:

> There has now come to be widespread agreement . . . that civil rights acts are remedial and should be liberally construed in order that their beneficent objectives may be realized to the fullest extent possible. To this end, courts favor broad and inclusive application of statutory language by which the coverage of legislation to protect and implement civil rights is defined. This policy has found application in determining such questions as, for example, what activities or circumstances were subject to a prohibition against discrimination, what persons were protected, and what constitutes a violation. Correlatively, exemptions and limitations which restrict the operation of such laws are strictly construed. [Citations deleted.]
> 3 *Sutherland Statutory Construction*, 4th ed., § 72.05, p. 392 (1974).

> [W]ith a word of caution. In finding that a termination of funds under Title VI of the Civil Rights Act must be made on a program by program *basis, we do not mean to indicate that a program must be considered in isolation from its context. . . .* Clearly the racial composition of the school's student body, or the racial composition of its faculty, may have an effect upon the particular program in question. But this may not always be the case. In deference to that possibility, *the administrative agency seeking to cut off Federal funds must make findings of fact indicating either that a particular program* [the assistance paid under a particular grant statute] *is itself administered in a discriminatory manner, or is so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory.* Only in this way can a reviewing court know that the effects of the Order entered by the agency have been limited to programs not in compliance with the Civil Rights Act." [Emphasis added.] *Id.* at 1078–1079.

Thus, the court refused to adopt a *per se* rule under which the discriminatory environment of Federal funds would always be presumed. Rather, it left open the possibility that Federal funds could be shown to be "infected by a discriminatory environment." Accordingly, the "pinpoint" provision of section 902 of Title IX should not be construed to limit the Department's jurisdiction to monitor and seek out noncompliance to those aspects of a recipient's activities which actually receive Federal dollars.

The above discussion goes to the point of whether a program or activity may be covered by the nondiscrimination strictures of Title IX even though that program or activity is not itself receiving Federal financial support. But, if students attending an institution of higher education are receiving benefits under the various Federal educational assistance programs, then *all* of the institution's activities that are supported by tuition payments of the students can be said to be receiving Federal financial assistance. The Court of Appeals for the Fourth Circuit, in *Bob Jones University v. Administrator of Veterans Affairs,* Civil Action No. 72–1325 (D.S.C., July 25, 1974) *affirmed per curiam,* No. 74–2164 (4th Cir., May 28, 1975), recently considered whether Federal grants (veterans' benefits) paid directly to students to support their attendance at Bob Jones University constituted Federal financial assistance to the University within the meaning of Title VI. The Court of Appeals affirmed, *per curim,* the following holding of the district court:

> Several reasons support the proposition that Bob Jones receives federal assistance. First, payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would, in the absence of federal assistance, be spent on the student. Analogously, Bob Jones' participation in the HEW administered National Defense Student Loan program (NSDL) relieved the university of the burden of committing its assets to loans to eligible students.
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> * * * * * * *
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> A second reason supporting the proposition that Bob Jones receives federal assistance is that the participation of veterans, who—but for the availability of federal funds—would not enter the education programs of the approved school, benefits the school by enlarging the pool of qualified applicants upon which it can draw for its educational program. [Citations deleted.] Order of District Court, pp. 8–9.

We hope these comments have been helpful. If I, or anyone in the Department, can be of further assistance to you or the Subcommittee on this or other matters, please let me know. I request that this letter be made part of the record of the hearing.

Sincerely,

CASPAR W. WEINBERGER,
Secretary.

Mr. O'HARA. Mr. Secretary, let me, before you leave, join with other members of the committee in expressing, on behalf of myself and the committee, my appreciation for the outstanding direction you have given to the Department over your tenure as Secretary. I think that the country can be grateful for the time, effort, and attention and creativity you put into your job, and I want you to know we appreiate it.

Secretary WEINBERGER. It is extremely nice of you. I deeply appreciate it.

Mr. O'HARA. We don't always agree.

Mr. Secretary, Mr. Brademas has three questions he asked me to ask.

He asked specifically if a college or university awards athletic scholarships in one or two predominantly male sports, such as football and basketball, must it, under the regulations, award athletic scholarships in other sports as well?

Secretary WEINBERGER. The regulations, Mr. Chairman, would require that it award or that it have a reasonable scholarship assistance program for women's sports, without requiring equal aggregate expenditures or anything of the kind, but it does require that there should be some reasonable available pool of scholarship funds available for women if there are to be athletic scholarships for men.

Mr. O'HARA. But no specific ratios are prescribed?

Secretary WEINBERGER. That is correct.

Mr. O'HARA. Would it be permissible for the institution to base it in terms of what was reasonable, or would you say they could base their determination on the amount of student interest shown in the particular sport as between the two sexes or on enrollment or what kinds of criteria?

Secretary WEINBERGER. I would say is completely correct The provision says the school must provide reasonable opportunities. Well, reading the whole thing:

To the extent that a recipient awards athletic scholarships or grants and aid at all, it must provide reasonable opportunities for such awards to members of each sex in proportion to the number of students of each sex participating in intercollegiate or interscholastic athletics.

So, yes, to the extent you had some interest shown, you would have to provide some kind of scholarships.

Mr. O'HARA. So it has to be done in proportion to participation?

Secretary WEINBERGER. In proportion to the interest which is expressed by participation.

Mr. O'HARA. Thank you again, Mr. Secretary. I am going to declare a short recess of the committee while the members go to the House floor vote.

[A brief recess was taken.]

Mr. O'HARA. Our next witness will be Miss Doreen Brown of the National Council of Jewish Women.

STATEMENT OF DOREEN BROWN, NATIONAL AFFAIRS COMMITTEE, NATIONAL COUNCIL OF JEWISH WOMEN

Ms. BROWN. Thank you, Mr. Chairman.

My name is Doreen Brown. I am a member of the National Affairs Committee of the National Council of Jewish Women and immediate past president of that committee.

The National Council of Jewish Women, a social action and community service organization of 100,000 women in sections across the country, has, since its inception 83 years ago, been committed to the principle of equal opportunity for all, including equal legal rights, equal access to educational services, and equal employment opportunities.

We have worked consistently, at all levels of government, in support of legislation banning discrimination and protecting individual rights. Currently, the elimination of discrimination on the basis of sex and the establishment of equal rights for women is one of the National Council of Jewish Women's priorities for action.

We strongly supported title IX of the 1972 Education Amendments and its key provision that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

When the proposed HEW regulations to implement the title were issued by Secretary Weinberger in July of 1974, we were pleased to offer our comments and recommendations. In expressing our concerns, we concentrated on measuring the adequacy and relevance of the proposed regulations against the actual wording and intent of the law, and also within the framework of our organization's policy and philosophy.

We spelled out in considerable detail what we felt were the major weaknesses of the proposed regulations and offered specific recommendations for change, and we concluded our statement by urging that "the final title IX regulations be cast in a manner calculated to eliminate every aspect of sex discrimination within the limits prescribed by the law."

Although, in our opinion, the new title IX regulations have not been adequately revised to alleviate all of our major concerns, we are here today to urge strongly that the Congress approve these long awaited regulations so that they may go into effect on July 21, 1975, and the legislation may be implemented with no further delay.

Any other action by this Congress at this time would seriously undermine efforts to achieve equality for women in education. Institutions need immediate guidelines in order to start the positive steps necessary to eliminate discrimination, and women need immediate proof that the law which the Congress passed 3 years ago was intended to be implemented, not merely to appease.

The unconscionable 3-year delay on the part of HEW in issuing the regulations, which Secretary Weinberger claims was necessary to deal with the "difficult and controversial issues inherent in the law" and was "time well spent," has already cast serious doubts about the Secretary's disposition to carry out the mandate of the Congress.

Disapproval of the regulations by Congress, in order to please some of the opponents of title IX, and further delay, would cast even stronger doubt on the Congress' intent to carry out its own mandate. Such a move must not be condoned by this subcommittee or the Members of the House and Senate genuinely committed to women's rights in education.

You may ask why we are urging strongly the approval of these regulations when we have expressed strong concerns about their contents. The National Council of Jewish Women feels that the defects of the regulations can be corrected by legislative means after the regulations have officially gone into effect.

This procedure would have two advantages. The title could start to be implemented, and actual application of the regulations would make some of its weaknesses self-evident.

Without going into profuse details at this time, we would like to refer briefly to the major shortcomings which we feel need correction by legislative means. They are:

1. The absence of any mandatory requirements or relevant guidelines for remedial and affirmative action plans. Although we were pleased to note the addition of a provision requiring a self-evaluation to enable an institution to identify and eliminate current discriminatory practices, the elimination of a practice does not constitute corrective or compensatory action to remedy past discrimination and cannot be equated with an affirmative action plan.

2. The lack of specificity as relates to grievance procedures for student and employee complaints. "A prompt and equitable resolution" is called for in the regulations but not defined, and standards for procedures are not spelled out. Due process for the complainant, comparable to that provided for the recipient, should be required.

3. The provisions concerning the involvement of title IX institutions in the administration of single-sex foreign scholarship programs have been somewhat improved by the requirement that similar opportunities be made available to the members of the other sex.

No such conditions, however, have been placed on assisting students to gain admission to an education program which discriminates, if the discriminating institution is exempt under subpart B—single-sex private undergraduate institutions. In our opinion, this provision should be interpreted as condoning and encouraging discriminatory practices which clearly are in opposition to the intent of the law.

4. The failure to address the basic problem of sex bias and sex stereotyping in textbooks and curricular material. We feel strongly that it is the responsibility of our Government to formulate and enunciate a Federal policy concerning this crucial issue; a policy which would establish guidelines and encourage the elimination of this form of discrimination.

Although this constitutes only a partial list of the issues of concern to our organization, it represents some of the major points to which we would like to see the Congress address itself in order to insure that the intent of the law is fully carried out.

In summary, we wish to urge this Subcommittee to support approval of the HEW title IX regulations and, further, to recommend that Congress, after the regulations have gone into effect, take the necessary steps to amend the regulations so that they will fully reflect the intent of the act.

We urge that this be done without undue delay, but after adequate hearings before all committees involved so that all concerned citizens may have an opportunity to express their views on an issue crucial to the achievement of equal opportunity for all.

I thank you.

Mr. O'Hara. Thank you very much.

I am having difficulty understanding your third point, on page 3. If you have an institution that is specifically exempt under the law and it is the law that exempts them?

Ms. Brown. That is correct.

Mr. O'Hara. Single-sex private undergraduate institutions, I don't understand how you feel that way.

Ms. Brown. I don't claim that the law should cover the exempt institution, but I feel strongly the title IX institution which is assisting its students to attend a non-title IX institution is against the principle, certainly against objectives of title IX, and they should be discouraged if not mandated not to do so. But I am not referring at all to the institution which is not covered by title IX.

Mr. O'Hara. Ms. Brown, when I was a student at the University of Michigan some years ago, there was a problem with the fact that the university medical school had quotas on the admission of Jewish students, and I believe the quota was not to exceed 10 percent of an entering class at the medical school, that were to be Jewish students.

There were other forms of discrimination as well, but that was the one that came to public attention during the time I was in school there.

I notice, that with respect to your comments on affirmative action programs, that although you were pleased to note the admission of a provision in the regulations requiring self-evaluation to enable an institution to identify and eliminate current discriminatory practices, the limitation of a practice does not constitute corrective or compensatory action to remedy past discrimination and cannot be equated with an affirmative action program.

At the University of Michigan Medical School today, I can well imagine the son of a Jewish father who had been denied admission, one of my contemporaries, who had been denied admission to medical school just because of a quota, that son might be denied to attend medical school because his place was taken by a women or a member of another minority group.

Ms. Brown. I can well imagine it and I know it happened. My organization has a very strong position in favor of affirmative action and an equally strong position against quotas or proportional representations per se.

We do not feel the way others do, that what is called quotas, reverse discrimination, constitutes a quota. It constitutes someone, whether it is a Jewish father's son or whether it be Mr. O'Hara's son, may have to suffer because temporarily, in order that somebody who has been discriminated against for years will have an opportunity to join him in equality, we consider affirmative action a temporary measure and feel strongly that one does not equate equality by saying it exists after one has deprived an individual of one for many, many years.

We do have a very, very strong position against quotas and are very familiar with the situation that existed years ago, and that still possibly exists.

Mr. O'Hara. Well, if a medical school is going to take in a class of 100, reserves a certain number of places for someone.

Ms. Brown. This, of course, is not the issue in this case for women. But I agree with you that you can make a strong argument and we have argued this very, very strongly, we have participated in some of the court cases amicus curial and as strong a moral issue. I am not quite sure in inconvenience cases one can make for others of reverse discrimination; we still have a firm moral and ethical belief there is need for affirmative action in spite of the fact someone might be temporarily displaced, someone who might have more opportunities to find their application accepted in other universities than, say, a minority student applying would have.

Mr. O'Hara. I don't understand that to say to an applicant for a place in a professional school, and places in professional schools are much limited such as dental, medical, law school to say to an applicant, "I tell you, because of the color of your skin or because of your sex, we are going to deny you a place that we would otherwise have given you, but don't feel bad about it because 20 years ago it would have been the other way around."

Ms. Brown. You are putting it on the basis of a negative basis—we are denying you a place because of your color, or creed, or sex—while on a posiitve basis what you are saying is that someone who is as equally qualified as you are, within a set qualitative criteria, someone within that criteria who may have one degree less here on an objective test, but may have more as far a desire to study, as far as personality and as far as anything else, as far as motivation, we are giving that person an equal chance to yours of getting into the university.

This is the argument we base it on. We are not denying my son the opportunity, or your son the opportunity to go. We are saying there are many other opportunities for you, but John Doe, who comes very close to you in qualifications, does not have the same opportunities as you have and because there are limited places in medical schools this boy and his entire race needs to have the opportunity to have more doctors, and more lawyers, and professionals.

Mr. O'Hara. Well, I certainly am glad you are against quotas, though.

Ms. Brown. Very, very strongly.

Mr. O'Hara. Thank you.

Mr. O'Hara. Our final witness this morning is Barbara Gordon, who will be accompanied by Ms. Ellen McCartney, representing the American Association of University Women.

STATEMENT OF BARBARA GORDON, REPRESENTING THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, ACCOMPANIED BY ELLEN McCARTNEY

Ms. Gordon. Mr. Chairman, I am Dr. Barbara Gordon, incoming president of the Maryland State Division of the American Association of University Women. My professional experience includes 17 years in education at all levels, from preschool to graduate university teaching.

I have been a teacher, a counselor, an educational psychologist, a coordinator of research and am presently an educational consultant.

I have been an active volunteer in the educational area and was the 1975 recipient of the Montgomery County Education Association's Horn Book Award given to a citizen for "distinguished contributions to public education." I am also a wife and the mother of a junior high school daughter and an elementary school son.

Today I am representing the American Association of University Women. AAUW was founded in 1881 as the first association of college and university trained women in the world; we have a present membership of 193,000 women who are organized in 1,819 branches in all 50 States, the District of Columbia, Puerto Rico, and the Virgin Islands.

The association was founded in Boston at the Massachusetts Institute of Technology by women from colleges which are prominent in our country's history today. It was founded in the Boston area which was the center of cultural and intellectual vigor and a place to which the whole of the United States looked for leadership in secondary and higher education. Yet there was not either in Boston or in Cambridge, any public school where a young woman could be prepared for college.

Even in Philadelphia no girls could be prepared for college in a public high school until 1893. AAUW, therefore, was founded to help women to have an opportunity to prepare for college and to help women college graduates make meaningful use of their education in the professional world. These opportunities were automatically the right of men at this time.

Although nearly 100 years have elapsed and girls are able to be prepared for colleges and universities in public schools, they still do not have equal access to collegiate training, nonbiased counseling and employment.

The purposes of AAUW are in concert with the aims of title IX of the Educational Amendments of 1972 and we are most grateful to be able to appear before the Postsecondary Education Subcommittee today to express our support.

We have been disappointed that there has been virtually no enforcement of title IX in our country up to the present time and feel that it is imperative that the proposed regulations be approved. Further delay would lead many women in the United States to question the good faith of the Congress in this vital area. Title IX has a potential for positively influencing every person in the United States who is connected with our educational system as student or faculty member.

Education for women today must be considered as important as education for men has always been considered. Women must have the opportunity to be prepared for their responsibilities especially in the world of work.

Many persons have traditionally thought of employment for women as short term; something in which they became involved between completion of school and childbearing, when in actuality the average woman can expect to work for 25 years. This fact, coupled with pertinent U.S. Department of Labor data, illustrates why it is imperative for women to have an equal opportunity in basic and liberal education as well as in counseling and career preparation.

Since AAUW is vitally interested in higher education, we would like to speak today to the proposed regulations for admissions, counseling, marital, and parental status and textbooks. Many of our members are educational professionals in both elementary and secondary education and higher education. As professionals, they are concerned about equal treatment as employees; and when serving as part-time employees, they are concerned about receiving equity in terms of fringe benefits.

We would like to support the guidelines on sex discrimination in admissions to certain kinds of institutions—those of vocational, professional, graduate, and public coeducational undergraduate institutions. We are sorry not to see private undergraduate institutions included in this law since these institutions account for 42.7 percent of the total female collegiate enrollment.

Equal access to institutions of higher education is especially important to women who for many years have had to produce proof of higher cumulative averages than their male counterparts in order to gain admission to certain institutions because of a quota system based on such factors as departmental major or number of beds in a dormitory. The talent of many able women has been wasted because of unequal counseling or unequal access to higher education. AAUW believes that talent is one attribute which we can ill afford to waste in our present day world.

The regulations proposed would help give women an equal opportunity to pursue graduate work—an area where we are sorely in need of equal access. The U.S. Office of Education reported that of all degrees awarded in 1970, women earned 44 percent of the bachelor degrees, but only 37 percent of the master's degrees and 13 percent of the doctorate degrees. While the proportion of total degrees awarded to women has been increasing since 1950, the proportion of master's and doctorate degrees awarded them has decreased compared to 1930 when women earned 40 percent of the master's and 15 percent of the doctorate degrees.

Without the proposed regulations, there is nothing—except rare goodwill—which will prohibit sex discrimination in admissions and recruitment.

The American Association of University Women strongly supports the recent addition to the regulations of "prohibition against sex discrimination in counseling." Previously, this had been specifically aimed at the appraisal and counseling materials utilized in the guidance process. It does little good to have the latter without the former.

Theoretically, even though the families and society can foster traditional perceptions of role, career, and academic achievement potential in girls and women, counseling and counselors can provide objective data and guidance that will help girls and women become aware of the realities and opportunities in the world in which they will live.

Professional counseling became accessible to most secondary school students following World War II and received a financial boost with the passage of the National Defense Education Act in the late 1950's. Counseling currently available at the higher education and adult levels can be best viewed as sporadic.

In many colleges, this task is performed by academic personnel untrained in the counseling field and woefully wanting in such areas as labor force data for women. At other colleges and universities, there are counseling centers and placement officers who also do vocational counseling.

The AAUW assumes that the regulation term "counselors" refers to those who are given this responsibility, not just those who are specifically trained in this field.

Despite the improved availability of counseling, there are widespread feelings among women's groups today that professionals in the counseling field are fostering discrimination against females in course selection (nice girls take neither physics nor auto mechanics, "masculine" boys do not take home economics in career selection—still emphasizing the wife/mother role as the principal female vocation, but not the husband/father role as a major male task) and in material provided (some tests and a quantity of vocational guidance material have been found to be sexist, but still in use).

Although there have been some efforts on the part of professional associations in the counseling area to change the sex role stereotyping prevalent in the field, these efforts are on a voluntary level. These regulations are needed to make this a necessity rather than an option.

AAUW had indicated in its recommendations to HEW a major concern with the sexual stereotyping and female underrepresentation found in textbooks utilized in our schools and colleges. We are sorry that the regulations do not cover this important area, but we, too, have always been concerned with the rights guaranteed under the first amendment. We have been favorably impressed with the insight on the part of the major school textbook publishing companies in their effort to voluntarily correct the injustice done by them in their portrayal sex role stereotypes.

For our members, the regulation prohibiting discrimination based on sex in employment, recruitment, and hiring whether full time or part time, under any education program or activity which receives or benefits from Federal financial aid, is especially important. Over half of our members hold full- or part-time faculty positions in institutions covered by this regulation. AAUW has received from members informal comments regarding the lack of opportunities for promotion, the lack of opportunity for administrative appointment, and in some cases, the lack of ability to secure a position, particularly at the higher education level.

The Carnegie Commission on Higher Education in their report—"Opportunities for Women in Higher Education"—summarizes the realities of women both as students and as faculty members in higher education. These data in this 1973 publication substantiate what women have long suspected: (1) Historically, women in higher education have been and still often are disadvantaged as individuals compared to the level of their potential abilities: In admission to college. They perform better in college than their test scores predict, and yet their test scores are often discounted as against those of males in the admissions process. In acceptance into and promotion within faculties (and administrative staffs). In salaries paid. We estimate that on the average, women faculty members receive about $1,500 to $2,000 less per year than do men in comparable situations. This adds up to about $150 to $200 million per year across the Nation. (2) The situation for women on college and university faculties has deteriorated over recent decades, beginning with the 1930's. The impact of the women's suffrage movement had faded out by then. The Great Depression put an emphasis upon the employment of men. The most rapidly expanding fields in the 1940's and 1950's were the "men's" fields of science, engineering, and business administration.

The report favors at the college and institutional level: (1) Special efforts to recruit women into the pool from which appointees are selected. (2) Special consideration, in making appointments, to the potential contributions of women to departmental and college excellence in their roles as models and as special sources of sensitivity to the problems and aspirations of women students. (3) Policies that allow more part-time appointments, that provide for childbearing and childrearing leaves, that reduce the severity of antinepotism rules, and other policies that will assist women to find a fuller place in the academic world. (4) Greater interest in the adequate provision of child-care facilities and policies of cooperation with groups seeking to provide child-care arrangements. (5) More efforts to place women on administrative staffs. (6) More women on governing board.

"Women and Men and the Doctorate" by John Centra provides additional data on the realities of women who hold doctorates. First, it eradicates a commonly held view that women's graduate education is not utilized. Centra found that less than 2 percent of the women holding doctorates had never been employed. Approximately 65 percent worked full time without interruption. However, when the positions of male and female holders of the doctorate were assessed, it was determined that more women were instructors and assistant professors, whereas the men were professors, department heads, deans, and presidents. Centra also found that the disparity in income becomes greater with years of experience. Men's income varied from $18,700 for 5 or 6 years of experience to $27,000 for 22–23 years, while women's ranged from $16,400 to $21,800 for the same time periods.

AAUW is fearful that without these regulations which will enforce title IX of the Educational Amendments of 1972, the woman faculty member's status both in rank and salary may remain inferior or might even deteriorate.

Until the educational system of the United States provides equal opportunity for men and women, society will continue to suffer the tremendous loss of women's potential contribution. Therefore, we urge you to accept the proposed regulations for title IX of the Educational Amendments of 1972. It is important to promote women to first-class citizens; we feel that these regulations will help women along the road to this goal.

Mr. O'Hara. Thank you very much for your testimony, and I am just sorry that the House of Representatives has to have meetings during the time we have our committee meetings scheduled, and I know that many other members of the subcommittee would have liked to have heard your testimony, but they are involved on the floor of the House.

Ms. Gordon. Thank you.

Mr. O'Hara. The Chair will announce this is the conclusion of the subcommittee's hearings on the subject of title IX regulations. The record will remain open for submission of written statements until the close of business on June 30, and if there are those who wish to submit additional material for inclusion in the record, we will be pleased to receive appropriate material of that sort.

With that, the chairman announces that the subcommittee will take up the questions presented during the hearings immediately upon return of the House from the Fourth of July break.

I thank you very much for helping us out. The committee is now in adjournment.

[Whereupon, at 12 noon, the subcommittee was adjourned.]

APPENDIX

U.S. SENATE,
Washington, D.C., June 26, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Post Secondary Education,
U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am enclosing a memorandum in support of H. Con. Res. 310, which I hope you will include in the Record of your subcommittee's hearings relative to the regulations of the Department of Health, Education and Welfare purporting to implement Title IX of the Education Amendments of 1972.

As you may know, on June 5, 1975, I submitted S. Con. Res. 46 in the Senate, which seeks Congressional disapproval of the aforementioned regulations on the grounds that they are inconsistent with the Congressional enactment. Subsequently, I provided Congressman James Martin of North Carolina with a copy of that resolution, which he was kind enough to submit in the House of Representatives.

I hope that this memorandum will be of some benefit to you in determining the degree of consistency of the HEW regulations with the Act.

Please do not hesitate to call on me whenever I can be of service regarding this matter.

Sincerely,

JESSE HELMS.

Enclosure.

A MEMORANDUM IN SUPPORT OF HOUSE CONCURRENT RESOLUTION 310, TO DISAPPROVE THE REGULATIONS OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE RELATING TO NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE BY JESSE HELMS, U.S. SENATE

PREFACE

While it is my purpose to indicate with some degree of specificity the extent to which I believe that the Title IX regulations exceed and are inconsistent with the authority granted by the Congress to the Department of Health, Education and Welfare, I believe that a few initial observations and comments may be helpful.

While some seem to suggest that Federal Departments and agencies should exercise broad discretion when interpreting Acts of Congress and promulgating regulations, I feel that these departments and agencies should exercise a proper level of judicial restrain befitting a body that is, indeed, acting in a quasi-law making role. This is not to say that HEW was in error in promulgating the regulations in question. The Department had a clear Congressional mandate to do that, for the second section of Title IX expressly directs the Department to do so. Additionally, Section 844 of the Education Amendments of 1974 expressly directs the Secretary of HEW to prepare and publish regulations implementing Title IX.

Therefore, H. Con. Res. 310 does not seek to challenge the authority of the Department to prepare, publish or enforce such regulations. Rightly or wrongly, Congress has directed that this be done. The resolution seeks only a determination of the extent to which the Department has succeeded or failed in developing regulations which faithfully and consistently represent the meaning of Title IX.

Further, I believe that it will be useful both to the Department and the Congress for us to utilize this properly constituted procedure to give further elaboration of the Congress' purpose. The HEW regulations are broad, and if allowed to stand, they will have a very substantial impact on many aspects of education and extracurricular activities in the United States. I hope that the House of

Representatives and the Senate will take this opportunity to exercise more completely its proper role as representatives of the American people and attempt to discern what citizens want in this connection and reflect on how the public interest will be best served.

In the course of this memorandum, the following plan of organization is observed. The memorandum is divided into two parts, appropriately labeled. In Part I, it is my purpose to address three relatively broad issues that pervade numerous provisions of the regulations. They are: (A) Whether the Department of Health, Education and Welfare is justified in using racial discrimination cases and regulations as the prototype for the Title IX regulations; (B) the meaning of an "education program or activity;" and (C) the meaning of a "program or activity receiving Federal financial assistance."

Then, in Part II, these broader issues are related to the specific sections of HEW's regulations, indicating on a section-by-section basis the extent to which it is felt that the regulations are consistent, or inconsistent with the Congressional Act.

In proceeding, the express language of the primary active clause of Title IX should be kept thoughtfully in mind. It provides as follows:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

This clause, in its elemental divisions, may be viewed as follows:

(1) No person,
(2) in the United States,
(3) shall, on the basis of sex
(4) be excluded from participation in, be denied the benefits of, or be subjected to discrimination under
(5) any education program or activity
(6) receiving Federal financial assistance.

Of course, it is a fundamental legal principle that all of the above elements must be present before a violation of the statute occurs.

PART I

(A) The validity of the contention of the Department of Health, Education, and Welfare that racial discrimination cases and regulations may be used as a prototype for their Title IX regulations.

(B) The meaning of an "education program or activity."

(C) The meaning of a "program or activity receiving Federal financial assistance."

(A) RACIAL DISCRIMINATION: A PROPER PROTOTYPE?

In developing the Title IX regulations, it is uncontroverted that the Department used Federal court decisions and former HEW regulations pertaining to racial discrimination of an earlier era as a guide in their work. Additionally, when responding to inquiries from my office, representatives of the Department have cited Federal court decisions relative to racial discrimination as their authority in support of certain provisions of the regulations. For example, in a letter of October 25, 1974, Mr. Theodore A. Miles, Assistant General Counsel for Civil Rights, Department of Health, Education, and Welfare stated: "Since the language of Title IX so closely parallels that of Title VI (relative to racial discrimination), I believe it to be legally sound that interpretations as to the scope of coverage with respect to Title IX should also parallel interpretations of Title VI in similar areas."

Without agreeing, one can understand how it might be argued that a court decision relative to one form of discrimination may be cited in support of regulatory action pertaining to another form of discrimination. Presumably, this argument would contend that discrimination among human beings is essentially the same, and the principles are constant. In my view, it is important to dwell on this aspect of the underlying philosophy of the regulations before undertaking a more-detailed analysis of individual provisions, for this assumption by the Department is fundamental and prevades numerous specific provisions of the regulations.

SEX AND EQUAL PROTECTION OF THE LAWS

Therefore, let us consider the appropriateness of citing judicial precedents developed within the context of racial discrimination as support for certain

HEW positions regarding nondiscrimination as support for certain HEW positions regarding nondiscrimination on the basis of sex. A discussion of this point, of course, involves an examination of the equal protection clause of the Fourteenth Amendment to the United States Constitution, which provides simply that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is elementary that numerous court decisions have provided interpretation of that Constitutional language, and to fully appreciate its meaning, one must consider those cases. Law—the product of human efforts—is, by its very nature, less than perfect; and when a law attempts to ensure equality, its restrictive features impact upon some more than others. An absolutely perfect balance is never achieved, nor can it be. Thus, the Supreme Court, in interpreting the equal protection clause of the Fourteenth Amendment, has held that laws which differentiate among people are acceptable if the disparity in treatment is based upon a rational classification and all persons within that classification are treated equally. The Court's view is that the greatest level of equality is achieved when people who are similarly situated are treated equally, but with a frank recognition that situations vary.

The contention is that this recognition reflects realities of life inherent in the nature of humanity over which no court or government can gain effective control. For example, it is a fact of life that people, once young, grow old; and to require that all 10-year-olds, 25-year-olds, and 75-year-olds be treated altogether as one class is neither the purpose nor the meaning of "equal protection of the laws." Rather, the Court has wisely stated that all individuals in each such classifications are to be treated equally, but to require similar treatment for the 10-year-olds and the 75-year-olds would benefit neither, and would unnecessarily restrict both. This is the meaning of the Constitutional guarantee of "equal protection of the laws." *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969); *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Muller* v. *Oregon*, 208 U.S. 412 (1908).

In *Lindsley* v. *Natural Carbonic Gas Company*, 220 U.S. 61 (1911), the United States Supreme Court stated that, in determining the reasonableness of a statutory classification, the following criteria should be considered:

> 1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and, therefore, is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because, in practice, it results in some inequity.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

The Court went on to say that "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

The foregoing definition was recited with approval by the Supreme Court in *Morely* v. *Doug*, 354 U.S. 457 (1957). Additionally, in *Reed* v. *Reed*, 404 U.S. 71 (1971), the Supreme Court, in striking down as violative of the equal protection clause an Idaho law giving preference to men over women when persons of the same entitlement apply for appointment as administrator of a decedent's estate, decided the case on the basis of the criteria established in *Lindsley* v. *Natural Carbonic Gas Company*. The Court said:

> In applying that clause (equal protection), this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. (citations omitted) The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantially relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike'.

The Court felt that giving a preference to men over women in the administration of decedents' estates indeed was not reasonably and substantially related to a proper legislative purpose because there is no justification for treating women differently than men in that regard. However, the important lesson in this case is that the Supreme Court reaffirmed the test of classification enunciated in *Lindsley* v. *Natural Carbonic Gas Company*, and it did so in 1971, stating that the Court has "consistently recognized that the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways."

Therefore, it is clearly the general rule followed by the Supreme Court that it is permissible under the equal protection clause to establish rational classifications which bear a reasonable relationship to a proper legislative purpose, and to treat various classes so established differently, provided that all persons within a particular class are treated equally. The Court has obviously followed this long-established rule because it provides a means of offering an "equal protection of the laws" without unduly denying one citizen his rights unnecessarily in an overly zealous attempt to ensure another equality.

Additionally, the Court has recognized a presumption which operates in favor of the reasonableness of legislative classifications. Under this presumption, if any state of facts can reasonably be conceived that would justify the classification, the existence of those facts will be assumed by the Court to be the basis for the classification, and the legislation will be upheld as not violating the equal protection clause. *Lindsley* v. *Natural Carbonic Gas Company*. Further, in *Muller* v. *Oregon*, 208 U.S. 412 (1908), the Court held that there are certain "natural classifications" which, by the order of nature and the being of humanity, are obviously rational, and therefore, acceptable. Such "natural classifications" the Court said include age, sex, weight, and height. Realizing the date of *Muller* v. *Oregon* (1908), it will be necessary to subsequently consider the validity of that decision in the light of more recent decisions and modern circumstances.

EXCEPTION: "SUSPECT CRITERIA"

In fairly recent years, the Court has developed an exception to the general rule discussed above. This exception evolved out of the race discrimination cases of the 1960's and it provides, in essence, that where the classification is based on certain "suspect criteria," or where the classification restricts a "fundamental" right, a stricter test of the validity of the classification will be applied.

In *Shaprio* v. *Thompson*, 394 U.S. 618, the Court held that, where such "suspect criteria" or "fundamental" rights are involved, the classification must not only meet the standards of the traditional test of reasonableness, as indicated, but there must also be a compelling state interest served by the classification. Under this exception, little or no presumpion is indulged in favor of the validity of the classification; but it must stand or fall on its own. *The Constitution of the United States, Analysis and Interpretation*, at page 1474 (1973). Of course, race has been held to be a "suspect criteria" and classifications based on race have been held to be violative of equal protection, absent a compelling state interest. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Hunter* v. *Erickson*, 393 U.S. 385 (1969). However, even in this regard, the Court held in *Lee* v. *Washington*, 390 U.S. 333 (1968), that "preservation of discipline and order in a jail might justify racial segregation there if shown to be necessary (and compelling to the interest of the state)." *The Constitution of the United States, Analysis and Interpretation*, at page 1474, footnote 4 (1973).

While race has been the primary application of the "suspect criteria" exception, nationality and alienage may also be included. *Graham* v. *Richardson* 403 U.S. 365 (1971). But, while "suspect criteria" is directed to the reasonableness of the classification, the "fundamental" rights question involves the validity of the legislative purpose. Only a compelling state interest will justify the abridging of such rights. Examples of "fundamental" rights include the right to vote, *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); the right to interstate travel, *Shapiro* v. *Thompson*, 394 U.S. 619 (1969); the right to be free of wealth distinctions in the criminal process, *Tate* v. *Short*, 401 U.S. 395 (1971); the right to procreation, *Skinner* v. *Oklahoma ex rel.* Williamson, 316 U.S. 535 (1942).

The application of this stricter test has been limited to criteria involving race, nationality, alienage and the Court has generally attempted to strike down efforts to structure classifications, however derived, which have the practical effect of classifying by race.

PRIVATE VERSUS STATE ACTION

While the above discussion has been directed largely at state action, that is to say state laws establishing classifications, it is important to note that action in this regard may be of a private nature, as opposed to governmental. With regard to private action—that is to say, action by individual citizens, or private institutions—the Court has taken the position that the equal protection clause does not apply, and privately established classifications, however unreasonable, do not constitute a violation. In *Shelley* v. *Kramer*, 334 U.S. 13 (1948), the Court said that: "The 14th Amendment erects no shield against merely private conduct, however discriminatory or wrongful." This of course, is a frank realization by the Court that, while it can strike down and prohibit governmentally imposed discrimination, it cannot effectively control the minds of citizens which are ultimately answerable to a higher tribunal.

On the other hand, while the equal protection clause does not empower the Supreme Court to review private classifications, Congress has acted in this regard, and the Court has upheld such Congressional enactments. For example, the Court did not have the authority to prohibit racial discrimination in public accommodations, but Congress enacted the Civil Rights Act of 1964 prohibiting such discrimination. In *Heart of Atlanta Motel* v. *U.S.*, 370 U.S. 241 (1964), that provision was upheld by the Court; and regardless of prior debate concerning Congress' authority to regulate such private action, it is clear that Congress may now do so. Of course, prior to 1972, Congressional limitations upon the right of private citizens and educational institutions to establish classifications of their own choosing had been limited primarily to matters pertaining to race, religion, color, national origin, and the like. And even with the enactment of Title IX of the Education Amendments of 1972 relative to discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance . . .," Congress has only partly limited private or state classifications using sex as a criteria. To be sure, there are other Congressional enactments pertaining to equal employment opportunity, etc., but clearly, Congress has not chosen to directly pattern legislation relative to sex as a classification after the racial legislation of an earlier era. For example, under existing law, public accommodations may not be restricted on the basis of race, but they may be restricted on the basis of sex. It is not permissible to maintain any racially separate classes in public education institutions, but it is permissible to maintain certain separate classes for boys and girls, even under the extreme position advanced by the Department of Health, Education, and Welfare.

IS SEX A "SUSPECT CRITERIA?"

But recalling that HEW is citing Federal court decisions and former HEW guidelines as authority for many of the provisions contained in the Title IX regulations, one is compelled to ponder the validity of such action in terms of legal scholarship and decisions of the United States Supreme Court. If HEW considers that there is no legitimate distinction between race as a classification and sex as a classification, so that they may be viewed collectively and a race discrimination case may be cited in support of a sex discrimination regulation, and vice versa, one wonders if the United States Supreme Court has adopted this view. Having reviewed above the position of the Court regarding race as a classification, let us now continue our review of the decisions of the Court relative to sex as a classification. Surely, it is uncontrovertible that the United States Supreme Court, with its twenty years of history in striking down acts of discrimination, is uniquely qualified to determine the validity of HEW's contention that racial discrimination cases and regulations are an appropriate authority to support sex discrimination regulations which are supposed to implement a Congressional Act. How then does the Court view sex as a criterion for establishing a rational classification under the equal protection clause? Does the Court, like HEW, view sex as a criterion on the same footing with the previously disapproved efforts to establish race as a criterion? Because of the HEW assertion of similarity, this question is clearly central to a consideration of the consistency of the Title IX regulations with the Congressional Act. Let us then briefly review what the Supreme Court has said about sex as a classification under the equal protection clause:

Prior to November 22, 1971, the United States Supreme Court has never invalidated any law or regulations discriminating between people solely on

> account of their sex. In a number of earlier decisions spanning almost a century—from *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130, in 1873 through *Hoyt* v. *Florida*, 368 U.S. 57, in 1961—the Court has uniformly rejected the argument that various sex-based state laws contravened certain guarantees of the fourteenth amendment." "Sex Discrimination and the Supreme Court—1971–1974," *New York University Law Review*, by John D. Johnston, Jr., Professor of Law, Vol. 40, No. 5 (Nov. 1974).

As Professor Johnston points out, during the period 1971 through 1974, the Court heard and decided six cases dealing with this question. In *Reed* v. *Reed* (1971), previously discussed, the Court clearly applied the traditional "rational classification" test. Then, in 1972, the Court decided *Stanley* v. *Illinois*, 405 U.S. 645, which involved an Illinois statute declaring that the mother was the sole parent of an illegitimate child. The constitutionality of the statute was challenged by the father of the illegitimate child. In striking down the statute, the Court decided the case primarily on "due process of law" grounds, finding that the father had been denied custody of the child without the benefit of a hearing as to his fitness to be its guardian. While mentioning the "equal protection clause" within the context of married versus unmarried fathers, the Court, in resting the weight of the decision on the "due process clause," elected not to directly address the question of sex as a classification under the "equal protection clause."

In 1972, the Court heard *Frontiero* v. *Richardson*, 411 U.S. 677. The case involved an Air Force officer who attempted to claim her husband as a dependent in order to obtain housing and medical benefits. The statutes authorizing dependents' allowances for military personnel provided that married males were eligible to receive allowances without proof of their wives' actual dependency, whereas females were required to prove that their husbands were dependent upon them for more than one-half of their support. While the Court held the statute invalid as violative of the Fifth Amendment due process-equal protection standards, the majority of the Court declined to treat sex as a "suspect criteria" justifying the more-strict review test.

During the following term, the Court heard Cleveland Board of Education v. Lafleur, 414 U.S. 632 (1974). Before the Court was a challenge to the validity of mandatory pregnancy leave regulations imposed by two public school boards upon their female teachers. Deciding the case on due process grounds, the majority held that a regulation mandatory pregnancy leave four or five months prior to birth of the child was arbitrary, as were regulations prohibiting re-employment prior to a stated period following birth; but it upheld a rule making the teacher eligible for re-employment as soon as a physician certified her fitness, but deferring her resumption of responsibilities until the beginning of the next school year after such certification. The Court indicated that the latter rule served a legitimate state interest in preserving continuity of instruction; and it was sufficiently flexible to take into account individual differences among women as to when they could resume employment following childbirth. The decision did not indicate that pregnancy is not a condition unique to women, or that it is analogous to any other temporary disability. On the contrary, the Court upheld a rule requiring a certification of fitness by a physician before a woman who had given birth could resume employment. There was no indication of evidence that any such certification was required for men who had undergone any infirmity, or that it was required of women for any infirmity other than pregnancy. Hence, the Court approved the treatment of pregnancy as a condition unique to women, justifying a special rule of a distinct classification of teachers.

Three months after the *LaFleur* case, the Court decided *Kahn* v. *Shevin*, 416 U.S. 351 (1974). Under consideration was the constitutionality of a Florida statute which granted a $500 exemption from *ad valorem* property taxation to every "widow, blind person, or totally and permanently disabled person." The statute was challenged by a widower. The Court upheld the statute, and based its decision on the traditional "rational classification" test, citing the *Reed* case as authority. The Court said:

> It has been ably pointed out that the object of the legislation here in question is "to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to reduce the disparity between the economic . . . capabilities of a man and a woman . . ." . . . (W)omen workers as a class do not earn as much as men. Certainly this has a "fair and substantial relation" to the ability of women property owners to pay taxes on property of even minimal value.

Whether the decision represents a view toward the inability of women to compete for salaries because of elements inherent in their being or because of social factors and attitudes is simply not stated. All that is stated is that the Court determined that the statue treating women differently from men is acceptable.

Finally, the Court heard *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). The case arose out of a California statutory program providing benefits for employed persons unable to perform their usual duties because of physical or mental disability, but denying such benefits to pregnant women for loss of work due to pregnancy or any complications arising therefrom, during the pregnancy and/or 28 days after its termination. The *lower* Federal Court found that the pregnancy classification was a "suspect criteria" invoking the more strict review test, but *the Supreme Court reversed the lower court and refused to accept pregnancy as a "suspect criteria."* Interestingly, the Court denied that the classification was based upon "gender as such." It concluded that the classification was not on gender, but on the basis of pregnancy; and while only women can become pregnant, the fact alone was not held to be determinative. The Court said "The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes."

During the same period when the above six cases were being considered by the Supreme Court, another case was assending through the Federal appellate process. Arising out of the State of Kentucky, *Ruth Robinson* v. *The Board of Regents of Eastern Kentucky University,* 475 F. 2d 707 (1973), was heard by the United States Court of Appeals for the sixth Circuit, and a decision was rendered on March 28, 1973.

The case involved a class action by a female student to challenge dormitory curfew restrictions at Eastern Kentucky University which were applicable only to women students. The suit was dismissed by the United States District Court for the Eastern District of Kentucky, and the plaintiff appealed. It was expressly charged that "the University, by imposing dormitory hours for women, while granting self-regulated hours to all male students, regardless of age or permission from their parents, had violated her Fourteenth Amendment right to the equal protection of the law." This case clearly presented for judicial review the position advanced in the HEW regulations implementing Title IX. Section 86.32 of the HEW regulations provides that: "A recipient (educational institution) shall not, on the basis of sex, apply different rules or regulations . . . related to housing . . ."

In upholding the University regulations, the Court of Appeals decided the case by the traditional "rational classification" standard. Citing numerous cases, including *Lindsley* v. *Natural Carbonic Gas Company* (1911) and *Reed* v. *Reed* (1971), both discussed earlier herein, the Court said that "The equal protection clause does not require identical treatment for all people. The states retain, under the Fourteenth Amendment, the power to treat different classes of persons in different ways." Continuing, the Court said: "Courts often have upheld state classifications based on sex."

Explaining the two standards that the Supreme Court uses in reviewing "equal protection" cases ("rational classification" v. "suspect criteria"), the Court of Appeals said:

> Two separate and distinct standards of review under the equal protection clause have emerged. The first, which has a much longer history, is the traditional or rational basis test. It requires that a state classification be upheld unless there is no rational relationship between the classification imposed by the state and the state's reasonable goals. Under this standard, "(a) statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." (citations omitted)
>
> The second alternative standard, the compelling state interest test ("suspect criteria"), is relatively recent in formation and provides a greater burden for the state to meet in justifying a classification in its statutes, or regulations. This test, which becomes applicable when a fundamental right of the aggrieved party is at issue or a suspect classification, such as race, is used, requires that to justify the classification, the state must demonstrate a compelling state interest.

Returning to the precise issue presented in *Robinson* v. *Board of Regents,* the Court said that "in this case we can find neither a fundamental right at issue nor a suspect classification being applied. . . . (W)e conclude that the rational relationship or traditional standard of equal protection review is applicable here. . . . The goal of safety is a legitimate concern of the Board of Regents and this court cannot say that the regulations in question are not rationally related to the effectuation of this reasonable goal. . . . A classification having some reasonable basis does not offend the equal protection clause merely because it is not drawn with mathematical nicety." The judgment of the lower court, in dismissing the case, was affirmed.

On August 1, 1973, the plaintiff filed a writ of certiorari in the United States Supreme Court seeking review by that court of the question of whether sex is "suspect criteria" and whether she had been denied "equal protection of the law." Obviously, the Supreme Court was then presented with the opportunity to hear the case, and in its wisdom, establish sex as a "suspect criteria" for evermore. However, *Robinson* v. *Board of Regents* laid dormant, no action being taken by the Supreme Court on the writ of certiorari, while the Court heard and decided *Kahan* v. *Shevin* and *Geduldig* v. *Aiello*, both of which, as previously indicated, were decided on the basis of the traditional, rational classification standard; and, as noted, in *Gedulding* v. *Aiello*, the Supreme Court expressly overturned the lower Court' decision favoring pregnancy as a "suspect criteria."

What then did the Supreme Court do with *Robinson* v. *Board of Regents?* On May 13, 1974, the Supreme Court denied certiorari, 416 U.S. 982 (Supreme Court Docket No. 73-221). Clearly, the Supreme Court felt that, in reviewing six sex discrimination cases within four years and refusing to find sex to be a "suspect criteria," or even to strike down such a classification on equal protection grounds, the question had been decided. Thus, the decision in *Robinson* v. *Board of Regents*, favoring the right of a state-supported University to establish different dormitory curfew rules for women students than for men students, stands approved by the United States Supreme Court.

In conclusion, it appears that the Court has modified its historic position only slightly in that it will review alleged sex discrimination cases and possibly strike down a state law or regulation if it appears that the aggrieved party has been denied "due process of law." But, it appears equally clear that the Court has had ample opportunity to consider the proposition of whether the question of sex discrimination is on the same footing with racial discrimination, as the Department of HEW contends. Clearly, the Supreme Court has responded in the negative and refused to follow its own precedents relative to race discrimination cases when deciding sex discrimination questions.

It is therefore submitted that, since the United States Supreme Court does not view race discrimination precedents as supportive of sex discrimination contentions, the Department of HEW is not justified in utilizing either race discrimination cases or race discrimination regulations as supportive of its regulations implementing Title IX.

(B) EDUCATION PROGRAM OR ACTIVITY

Section 901 of Title IX provides that the prohibition relative to exclusion or discrimination on the basis of sex shall pertain to "any education program or activity. . . ." It is important to note that Congress did *not* say "any program or activity." It qualified the term by prefacing it with the word "education." Therefore, the prohibition relative to discrimination on the basis of sex extends only to programs and activities that are a part of the education process.

However, the Department of Health, Education and Welfare in its regulations has elected to adopt an extremely broad definition of the term "education;" and therefore, it is necessary to consider exactly what is considered to be an "education program or activity" under Title IX.

Even a superficial survey of reported Court decisions throughout the nation reveals that structured physical education, or physical training programs, which are a part of either the required or elective curriculum of an educational institution, are considered to be education programs and activities. Accordingly, there is no doubt of the inclusion of such programs within the meaning of the term "education" in section 901 of Title IX.

However, since the HEW regulations include "extracurricular" programs and activities in their coverage of applicable programs and activities (HEW section 86.31), it becomes pertinent to consider whether extracurricular programs and activities are properly within the purview of the term "education." It is a fundamental rule of construction that, unless a contrary intent is expressly evidenced, words within a statute shall be given their common, natural, or customary meanings. *Southerland's Statutory Construction*, fourth edition, Volume 2-A,

§ 46.01, pages 48 and 49; *Order of Railway Conductors of America v. Swann*, 329 U.S. 520 (1947).

Further, *Webster's New World Dictionary of the American Language*, second college edition (1972) states that education involves "formal schooling at an institution of learning; systemic study of the methods and theories of teaching and learnnig." "Curriculum" is defined therein to mean "a fixed series of studies required, as in a college, for graduation, qualification in a major field of study, etc.; all of the courses, collectively offered in a school, college, etc., or in a particular subject." On the other hand, "extracurricular" is defined therein to mean "not a part of the required curriculum; outside the regular course of study but under the supervision of the school."

Clearly extracurricular programs and activities are not commonly and customarily considered to be within the term "education." This commentator is not aware of any United States Supreme Court decisions attempting to define the meaning of the term "education" in this context. Further, a constitutional lawyer in the American Law Division of the Library of Congress indicated the same conclusion.

However, in its recent decision in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973), the Supreme Court held "that there was neither a suspect classification nor a fundamental interest involved" in the plaintiff's contention that he had been denied equal educational opportunity in violation of the equal protection clause of the Fourteenth Amendment, and "that the (educational) system must be judged by the traditional restrained standard, and that the system was rationally related to the State's interest in protecting and promoting local control of education." *Constitution of the United States, Analysis and Interpretation*, page S118 (1974 Supplement).

Additionally, the Supreme Court said that ". . . the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . . (T)he answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." The Court concluded that "A right to education is not expressly protected by the Constitution." and it was "unwilling to find an implied right. . . ." *Constitution of the United States, Analysis and Interpretation*, page S119 (1974 Supplement).

It is, therefore, evident that the Supreme Court has *not* been willing to extend the "suspect criteria" or "fundamental" right test under the equal protection clause to nonracial discrimination in educational opportunity. Further, the Court has concluded that there is no Constitutionally protected right to education. Applying the common, customary meaning of the term "education" and the term "extracurricular" cited above in the light of the Court's decision in *San Antonio School District* v. *Rodriguez*, it is obvious that the Supreme Court has declined to follow its precedents relative to the "suspect criteria" test (racial discrimination) when assessing the availability of educational opportunity. It is, therefore, submitted that the Department of HEW is not justified in citing Supreme Court decisions involving racial discrimination or in using Title VI regulations as a prototype in extending the Title IX regulations to include extracurricular programs and activities, or other nonacademic services.

Therefore, the common, customary meaning should be given to the term "education" in section 901 of Title IX. That plain meaning, as previously indicated, does not include extracurricular programs and activities. It is equally obvious that the term cannot properly be extended to include student housing, medical services and benefits, and other such services offered by an educational institution.

(C) PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE

In addition to the limitation of the applicability of Title IX to an "education program or activity" as indicated in the preceding section of Part I of this memorandum, section 901 of Title IX provides that the prohibition of exclusion, or discrimination on the basis of sex applies only to "education programs and activities receiving Federal financial assistance." Thus, it is clear that *not* all education programs and activities are included. The statute applies only to those which receive Federal financial assistance.

However, the Department of Health, Education and Welfare has extended its regulations to include every "education program or activity . . ." ". . . which receives *or benefits from* (emphasis added) Federal financial assistance." (HEW regulations, section 86.11). Obviously, Congress in its enactment of Title IX did not say "or benefits from Federal financial assistance." HEW added that.

Further, the word "benefits" is used three times in Title IX, once in subsection (a) of section 901, and twice in subsection (b) of section 901. In all three instances, the word is clearly used to modify "person," "persons," or "members of one sex." *At no time is it used to modify the phrase "education program or activity" as HEW's use of the word suggests.*

Since the language of Title IX speaks in terms of "receiving Federal financial assistance," it is useful to consider the meaning of the term "receiving." Realizing that this term has historically been employed in the drafting of legislation, in addition to its wide use throughout the law, the commentator believes that recourse to a more legalistic definition is appropriate (although application of the common, customary definition as contained in Webster would render the same result). *Corpus Juris Secundum*, Volume 74, "Receive," page 643, provides that ". . . 'receiving' necessarily implies consenting to receive, and that there is a receiving whenever there is a change of possession, as when one parts with the control of a thing and another takes and accepts it." Clearly, the act of "receiving" occurs and is completed when one entity delivers possession of a thing to another entity, which accepts it. There is no basis for believing that Congress intended by the enactment of Title IX that the meaning of this term should be extended so as to indirectly encompass remote benefits to some program or activity separate from the education program or activity to which the Federal financial assistance is given.

Further, HEW cites Federal Court decisions involving racial discrimination in support of the inclusion of the phrase "or benefits from" in connection with Federal financial assistance. As indicated, in Section (A) and Section (B) of Part I of this memorandum, the Supreme Court has declined to follow its own precedents relative to racial discrimination when deciding sex discrimination questions as well as when deciding questions pertaining to discrimination in educational opportunity. *Reed* v. *Reed*, 404 U.S. 71 (1971); *Robinson* v. *Board of Regents*, 475 F. 2d 707 (1973), Certiorari denied, 416 U.S. 982 (1974); *San Antonio School District* v. *Rodriques*, 411 U.S. 1 (1973). Therefore, the citing of such cases in justification of HEW's provisions extending coverage of the regulations to programs and activities which do not themselves receive Federal financial assistance is rejected as not being properly supportive of such authority. The use of Title VI regulations as a prototype for the Title IX regulations is similarly rejected.

PART II—SECTION BY SECTION ANALYSIS OF THE HEW TITLE IX REGULATIONS

NOTE.—Where a section or part of a section of the HEW Title IX regulations is not mentioned, the same is not objected to as being inconsistent with the Act.

Note also that the various Subparts of Part II of this memorandum correspond to the Subparts of the HEW Title IX regulations. Additionally, for the convenience of the reader, the text of Title IX of the Education Amendments of 1972 together with the text of the HEW regulations purporting to implement Title IX appear at the conclusion of this memorandum.

SUBPART A—INTRODUCTION

Section 86.1.—Purpose and effective date: This section provides that the purpose of these regulations is to effectuate title IX of the Education Amendments of 1972, as amended by Public Law 93–568. It is also stated that it is the purpose of these regulations "to effectuate section 844 of the Education Amendments of 1974, Public Law 93–380.

Comment.—Section 844 of the Education Amendments of 1974 is not substantive law applicable generally to citizens of the United States. Rather, it is a directive from the Congress to the Secretary of the Department of Health, Education, and Welfare, and it is applicable only to the Secretary. Section 844 does not purport to amend title IX of the Education Amendments of 1972, nor does it do so. As such, it is not a delegation of authority from the Congress to the Secretary. As a directive from the Congress, it can properly be reviewed by the Congress, and it can be retracted, amended, or ratified. A proper means available to the Congress for such review is a Concurrent Resolution submitted pursuant to section 431(d) of the General Education Provisions Act (20 U.S.C. § 1232, *et sequitor*).

Section 86.2.—Definitions: Subsection (g), paragraph (ii) provides that "'Federal financial assistance' means . . . (s)cholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity."

Comment.—Title IX expressly states "programs or activities receiving Federal financial assistance." When a scholarship, loan, grant, wages, or other funds are paid to a person or other entity, who later pays such funds, in whole or in part, to an educational institution, the "Federal financial assistance is *received* by the person or entity to whom the government check is made payable. When the check from the government is not made payable to the order of the educational institution, such institution does not *receive* "Federal financial assistance." Any other interpretation defies the clear language of the Act, and is contrary to reason. For example, under the HEW view, when a parent is an employee of the Federal government, and therefore receives wages from the government, from which the parent pays for a child's tuition at an educational institution, the institution would be receiving Federal financial assistance. Obviously, the institution would indeed benefit indirectly by the existence of the Federal program employing the parent (who might not otherwise be financially able to pay such tuition), but it is submitted that Congress did not say "receiving *or benefitting* from Federal financial assistance." Congress said "receiving Federal financial assistance." Had Congress intended "or benefitting from," Congress had ample opportunity to include that language.

Subsection (h) provides the definition of "Recipient." It states among other things that a "recipient" is any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly *or through another recipient* (emphasis added) and which operates an education program or activity which receives *or benefits from* (emphasis added) such assistance, including any subunit, successor, assignee, or transferee thereof."

Comment.—The phrase "through another" is objected to as being inconsistent with title IX for reasons stated previously. The phrase "or benefits from" is objected to for reasons stated in the preceding paragraph, and in Part I, Section A of this memorandum. For the balance of this memorandum the commentator will speak in terms of "educational institutions" rather than recipients. It is believed that the former term conveys a clearer and more graphic meaning to the average reader. It should be understood that as used in this memorandum "educational institution" may mean any elementary or secondary school, or any vocational school, professional school, college or university, whether for undergraduate or graduate study. The only exception is with regard to admissions to such school, in which case the term applies only to vocational schools, professional schools, school of graduate higher education, and to public (but not private) undergraduate colleges and universities.

Subsection (o) of section 86.2 provides the definition of "Administratively separate unit." The term is defined to be "a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution."

Comment.—The corresponding portion of title IX is as follows: ". . . an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution (obviously, as just defied) composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department." Section 901, subsection (c) of title IX. The language of title IX does not preclude the possibility that a local educational agency could be or contain an administratively separate unit. Therefore, HEW has no license to preclude such possibility. Additionally, HEW requires that to qualify as an "administratively separate unit," admission to such unit must be independent of admission to any other of the institution. By this requirement, HEW has interjected a criteria not contained in and inconsistent with title IX, section 901, subsection (c).

Section 86.3.—Remedial and affirmative action and self-evaluation—Subsections (a) and (b) provide for remedial or affirmative action on the part of an educational institution to enable affected persons to overcome the effects of supposed past discrimination.

Comment.—Nothing in title IX grants HEW authority either to require remedial or affirmative action or to promulgate regulations requiring or indicating permissively the desirability of such action. One can only assume that HEW section 86.3 (a) and (b) are based on title VI regulations (relative to racial discrimination) and Supreme Court cases involving such discrimination. As indicated in Part I, Section A of this memorandum, the citing of such regulations and cases in support of provisions of the title IX regulations as well as the use of same as a prototype for the title IX regulations is objected to as being inconsistent with the Act and Supreme Court decisions.

Subsection (*c*) requires "self-evaluation" by educational institutions and correction of practices that are violate of title IX. Needless to say, it is inherent in the nature of any law that those affected must comply with it, and if they have not historically complied with a new law, it is incumbent upon them to determine the extent of their noncompliance, and rectify it. To the extent that these subsections state that truism, they are not objected to; however, paragraph paragraph (iii) requires "appropriate remedial steps to eliminate the effects of any discrimination which resulted or may have resulted from adherence to these (noncomplying) policies and practices."

Comment.—In as much as this involves remedial or affirmative action, it is objected to for reasons stated in the preceding paragraph. Additionally, it is observed that paragraph (iii) requires such remedial action to eliminate the effects of discrimination which " . . . *may have resulted* . . . " (emphasis added) from adherence to noncomplying policies and practices. This phrase is too vague to place educational institutions on notice as to what is expected of them. It, therefore, is violative of any basic sense of fairness, and affords HEW an open-ended license to arbitrarily indicate that some well intended, seemingly harmless policy or practice "may have resulted" in some degree of discrimination, and the educational institution must compensate for that. Furthermore, under this "may have resulted" phrase, the educational institution, as a practical matter, will have no alternative but to assume that any policy or practice which, under any conceivable state of facts, could possibly have resulted in discrimination necessitates remedial or affirmative action. Otherwise, the educational institution would place itself in jeopardy of a possible finding by HEW that it failed to implement remedial or affirmative action as required by the "self-evaluation" provision. It is submitted that such a harsh result is not consistent with the purpose of title IX.

While paragraph (i) of subsection (c) is objected to, to the extent that it pertains to employees of an educational institution, comment regarding the inclusion of such employees is reserved to a subsequent portion of this part.

Subsection (*d*) requires that "Recipients (educational institutions) . . . maintain on file for at least three years following completion of the (self)-evaluation required . . ., and (requires educational institutions to) provide to the Director upon request a description af any modifications made pursuant to (the self-evaluation) and of any remedial steps taken pursuant to (such self-evaluation)."

Comment.—HEW cites sections 901 and 902 of title IX as supportive of subsection (d). The only language in either section 901 or 902 which could conceivably bear on the requirement of subsection (d) appears in section 902, which provides in pertinent part that no "department or agency concerned" shall take any "action" relative to a possible violation of title IX until it has "advised the appropriate person or persons of the failure to comply with the requirements and has determined that compliance cannot be secured by voluntary means." This language obviously contemplates the situation where a violation of title IX has been determined to exist, and the remaining consideration is what to do about it. The Act, as above cited, requires HEW to make an effort to secure compliance by "voluntary means." However, section 86.3 of the HEW regulations requires the educational institutions to place themselves on trial, judge themselves, and after rendering a verdict, to implement their own judgement, and, under subsection (d), to report to HEW the results. There is nothing in title IX granting to HEW the authority to require that. Citations to title VI regulations or Supreme Court cases involving racial issues in support of such requirements is rejected for reasons stated in Part I, Section A of this memorandum.

Section 86.4.—Assurance required: This section requires that each "application for Federal financial assistance for any education program or activity as a condition of its approval contain . . . an assurance from the applicant . . . that each education program or activity operated by the applicant and to which . . . (these regulations apply) will be operated in compliance with (these regulations)." The section goes on to state that such "assurance of compliance . . . shall not be satisfactory to the Director (of the Office of Civil Rights of HEW) if the applicant . . . fails to commit itself to take whatever remedial action is necessary in accordance with § 86.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination. . . ."

Comment.—To the extent that this section relates to remedial or affirmative action to remedy the effects of supposed "past discrimination," it is objected to for reasons previously stated.

Section 86.5.—Transfers of property: This section contemplates the sale or transfer or Federally financed (in whole or in part) property; and unless certain requirements are met, it indicates that both the transferor and the transferee shall be deemed to be recipients of Federal financial assistance, and therefore, subject to HEW's regulations.

Comment.—While the necessity of some such provision is recognized to prevent "dummy transfers" simply for the purpose of avoiding liability under the HEW regulations, the phrase "the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, is too vague to convey a clear meaning and is, therefore, objected to. For example: Does "accounted for to the Federal Government" mean "paid to the Federal Government," or does it mean a showing that the property was sold for a fair market value and was not a "dummy transfer?" Additionally, to which Department or agency of the Federal Government is the accounting to be made? Further, simple fairness requires that potential purchasers of property from educational institutions be more adequately placed on notice of this potential liability. If this is not done, one wonders of the extent to which educational institutions will suffer from an inability to sell property at a true fair market value because of a wariness of the part of potential purchasers regarding this unduly vague provision. One also wonders of the extent to which such "strings" on property will indeed inhibit its value to potential purchasers. Finally, it is felt that if HEW wishes to place such an encumbrance upon real property, the Department should duly record a lien to that effect in the Office of the Register of Deeds, or other appropriate official, in the county, or other appropriate political subdivision, where the real proper is located in order that potential purchasers will be put on proper notice of such encumbrance. To do less is to deny to private citizens the kind of careful protection that HEW seeks for itself.

Section 86.8.—Designation of responsible employee and adoption of grievance procedures: This section requires that each educational institution "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under . . . (these regulations) . . . including any investigation of any complaint communicated to such recipient alleging its noncompliance . . ." Notice to all students and employees of the name, address, and telephone number of such designated person is required. Additionally, educational institutions are required to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by (these regulations).

Comment.—There is no language in title IX granting to HEW the authority to require the designation of an employee as above indicated, nor is there any language in title IX granting to the Department the authority to require an educational institution to prepare and publish a grievance procedure, or to take action under such a procedure if prepared. Additionally, to the extent that such section pertains to employees, a further objection is interposed for reasons that will be stated subsequently.

Section 86.9.—Dissemination of policy: This section places elaborate requirements upon educational institutions to give publicity to their policy to comply with title IX. For example, subsection (a) paragraph 2, requires that "Each recipient . . . make the initial notification within 90 days of the effective date of this part . . . which notification shall include publication in: (i) Local newspapers; (ii) newspapers and magazines operated by such recipient or student, alumnae, or alumni groups . . ." The list goes on. Additionally, notifications of such policy must appear in the institution's bulletin, catalog, etc.

Comment.—There is simply no language in title IX granting to HEW the authority to make regulations including such requirements. Again, the use of citations to either title VI regulations or Supreme Court cases involving racial discrimination is rejected for reasons stated in Part I, Section A of this memorandum.

SUBPART B—COVERAGE

Section 86.11. Application.—This section provides that except as provided in title IX regulations, the regulations apply "to every recipient (educational institution) and to each education program or activity operated by such recipient which receives *or benefits from* (emphasis added) Federal assistance."

Comment: The corresponding provision in the Act is section 901, which provides for coverage under "any education program or activity receiving Federal financial assistance." Obviously, Congress did not say "or benefits from Federal financial assistance;" HEW added that. If Congress intended education programs and activities that benefit from such financial assistance to be included, Congress had ample opportunity to say so. Further, it should be noted that the word "benefits" is used three times in title IX, once in subsection (a) of section 901, and twice in subsection (b) of section 901. In all three instances, the word is used to modify "person," "persons," or "members of one sex." *At no time is it used to modify the phrase "education program or activity" as HEW suggests.*

Section 86.17. Transition plans.—This section among other things contains a subsection [subsection (d)] which is entitled "Effects of Past Exclusion." Reciting a supposed need to overcome "the effects of past exclusion of students on the basis of sex," the subsection requires educational institutions to "implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institutions. Such steps shall include instituting recritment programs which emphasize the institution's commitments to enrolling students of the sex previously excluded."

Comment: Subsection (d) is objected to because it is an "affirmative action program." As previously stated, there is no language in title IX granting HEW authority to require affirmative action programs, and citations relative to title VI regulations and Supreme Court cases involving racial discrimination are rejected as not being properly supportative of such authority for reasons stated in Part I, Section A of this memorandum.

SUBPART C

DISCRIMINATION ON THE BASIS OF SEX IN ADMISSION AND RECRUITMENT PROHIBITED

Section 86.21. Admission—Subsection (b), paragraph (2) provides that an educational institution "shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question *and* (emphasis added) alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable."

Comment: The above quoted provision merits a careful rereading. It states that an educational institution shall not use a test for admission on which members of one sex score less well than members of the other sex, it is shown that the test validly predicts success in the education program or activity in question. Thus far, the subsection, whether one accepts it consistency with title IX or not, is at least logically consistent within itself. But it goes on to say that an educational institution using a test on which members of one sex score less well than members of the other sex, and which test has been shown to validly predict success in the education program or activity, still cannot be used unless it is shown that alternative tests on which members of one sex do not score less well is not available. NOTE THAT THERE IS NO REQUIREMENT THAT THE LATTER TEST PRODUCING EQUAL RESULTS BE SHOWN TO VALIDLY PREDICT SUCCESS IN THE EDUCATION PROGRAM OR ACTIVITY IN QUESTION. Therefore, if on a particular test, which has been shown to be a valid prediction of students' ability to be successful in a particular education program, members of one sex score less well than members of the other sex, then, that test cannot be used if there is another test available (which may even have been shown *not* to validly predict students' ability to be successful in a particular education program), if on the second test members of both sexes score equally. This is patently ridiculous!

Additionally, this provision places the burden on the educational institution to prove that a particular test, on which members of both sexes do not score equally, validly predicts students' ability to be successful in a particular education program or activity. Aside from the fact that HEW is placing the burden on the defendant to prove himself innocent, HEW is additionally requiring the institution to do the impossible. No reasonable person contends that any particular test is a perfect measure of ability. Tests are the product of human efforts and subject to human frailties. Surely, it is the duty of those who construct such tests to make them as nearly perfect as possible, and where a choice of several tests is available, it is the duty of the educational institution to select the one, or ones, that are most nearly perfect in validity predicting students' ability to be successful. But to require the school to prove the validity of the test is to require an impossibility. None of the tests are *completely* valid; therefore, under the HEW provision, the only test that could be used would be one that showed equal results between members of both sexes, even though it may have been established that such test was not the most valid measure of ability available. This provision goes beyond the authority granted to the Department in title IX.

Subsection (*c*), *paragraph* (1) requires that with regard to admission, an educational institution "shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex."

Comment: Under this provision, an educational institution cannot refuse admission to unwed, pregnant students. It is not asserted herein whether educational institutions should, or should not, adopt such a policy. It is however contended that they have a perfect right to do so if they choose, and neither the United States Constitution (see Part I, Section A of this memorandum) nor title IX prohibits them from doing so. Specifically, title IX prohibits "exclu(sion) from participation in . . . any education program or activity . . . on the basis of sex." In *Geduldig v. Aiello*, 417 U.S. 484 (1974), the United States Supreme Court refused to strike down a statute treating pregnant public school teachers differently from nonpregnant public school teachers. In doing so, the Court denied that classification was based upon "gender as such." The Court concluded that the classification was not on gender, but on the basis of pregnancy and while only women can become pregnant, that fact alone was not held to be determinative. The Court said, "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Therefore, if any educational institution, in the exercise of its discretion chooses not to admit pregnant women, married or unmarried, while continuing to admit nonpregnant persons, according to this very recent Supreme Court decision, the institution would not be discriminating on the basis of sex. It would be discriminating on the basis of pregnancy, and in the Court's view, that is a valid criterion upon which to base a classification.

Paragraph (2) *of subsection* (*c*) of HEW section 86.21 provides that an educational institution "Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish any rule or practice which so discriminates or excludes." Paragraph (3) provides that an educational institution "shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition."

Comment: These paragraphs fly directly in the face of the Supreme Court ruling in *Geduldig v. Aiello* previously cited. The paragraphs are clearly inconsistent with title IX because title IX prohibits discrimination on the basis of sex, and the Supreme Court has held that differentiation on the basis of pregnancy is not discrimination on the basis of sex. Obviously, title IX does not mention pregnancy.

Paragraph (4) of the same subsection prohibits an educational institution from inquiring whether an applicant is "Miss" or "Mrs."

Comment: It's a minor point in the light of the totality of the regulations, but for a great many years, simple good manners have required that ladies be addressed either as "Miss" or as "Mrs." In recent years, the term "Ms." has evolved, apparently out of careless mispronunciation of the two former terms. This commentator welcomes the evolution of the term "Ms." because on many occasions he has been uncertain as to whether a particular female constituent to whom his staff was addressing correspondence was married or not. Therefore, it is now the policy of his office that when in doubt, use "Ms." The term, frankly, has utility. However, nothing in title IX prohibits an educational institution from inquiring into the marital status of applicants, and nothing in title IX requires that such an institution address its correspondence politely or crudely. In short, nothing in title IX gives HEW any license to effectively prohibit the use of "Miss" or "Mrs." under any circumstances. Additionally, since paragraph (4) of the subsection expressly allows inquiries as to the sex of an applicant, a perfect analogy exists between this situation and the Supreme Court ruling in *Geduldig v. Aiello*. The distinction is not on the basis of sex. The distinction is on the basis of whether a person is a married person or an unmarried person.

Title IX does not prohibit discrimination on the basis of marriage or non-marriage. It prohibits discrimination on the basis of sex. Both men and women get married, and presumably with some degree of mathematical correlation. The provision is clearly inconsistent with title IX.

Section 86.23. Recruitment—This section prohibits discrimination on the basis of sex in the recruitment and admission of students, and it indicates that an educational institution may be required to "undertake additional recruitment efforts for one sex as remedial action pursuant to § 86.3(a), and may choose to undertake such efforts as affirmative action pursuant to § 86.3(b)."

Comment: To the extent that an educational institution's recruitment program does not involve admission preferences for members of one sex, it is not violative of title IX. Nothing in title IX prohibits recruitment of students on the basis of any criteria the institution elects to use. Title IX only prohibits preferential admissions practices on the basis of sex. Additionally, to the extent that this section of the regulations pertains to remedial or affirmative action programs, it is objected to for reasons previously stated.

SUBPART D

DISCRIMINATION ON THE BASIS OF SEX IN EDUCATIONAL PROGRAMS AND ACTIVITIES PROHIBITED

Section 86.31. Education programs and activities—Subsection (a) prohibits exclusion from, or discrimination under, "any academic, extracurricular research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance."

Comment: To the extent that subsection (a) pertains to "extracurricular" programs or activities, and to the extent that it pertains to any programs or activities which are said to "benefit from", but which do not receive Federal financial assistance, it is objected to. The inclusion of "extracurricular" programs are objected to for reasons stated in Part I, Section B of this memorandum. However, to summarize briefly, the pertainent phrase in section 901 of title IX provides "education program or activity receiving Federal financial assistance." Clearly the word "education" modifies both the word "program," and the word "activity." Therefore, it is appropriate to read the phrase as "education program and education activity." The word extracurricular is an adjective as is the word "education" in the above context. Extracurricular is defined to mean "not part of the required curriculum; outside the regular course of study but under the supervision of the school." Webster's New World Dictionary of the American Language, page 497 (2nd ed. 1972). Clearly, a conflict in terms exists within the subsection of the regulations, as well as between the regulations and title IX. By its very definition extracurricular programs and activities are outside the scope of title IX. The use of the phrase "benefiting from Federal financial assistance" is objected to for reasons stated in Part I, Section C of this memorandum. Briefly, the objection lies in the fact that section 901 of title IX provides coverage for education programs and activities receiving Federal financial assistance. Congress did not say "or benefiting from" such assistance. HEW added that, and that HEW addition is inconsistant with the Act.

Subsection (b) paragraphs (4) and (5) provide that except as otherwise provided in Subpart D of the regulations, an educational institution cannot, on the basis of sex, "subject any person to separate or different rules of behavior, sanctions or other treatment; (or) Discriminate against any person in the application of any rules of appearance."

Comment: The broad sweeping nature of these two paragraphs deny any valid distinctions relative to behavior, treatment, or appearance between the sexes. Such a view flies in the face of the position adopted by the Supreme Court as discussed in Part I, Section A of this memorandum. Without attempting to imagine every possible instance when the above two paragraphs will result in regulating a result not intended by title IX, an obvious example is readily apparent. As will be noted subsequently, section 86.34 of the regulations requires that all classes including physical education classes (except to the extent that body contact is the purpose or a major part of the activity) must be taught in mixed classes of members of both sexes. Swimming is not generally considered a body contact sport, and it quite properly is not identified as such in section 86.34; therefore, when swimming is offered as a part of a physical education program, the swimming class must be conducted in mixed classes of members of both sexes. Since paragraph (5) of subsection (b) prohibits "the application of any rules of appearance" which discriminate on the basis of sex, an educational institution cannot prescribe different bathing suits for men and women. Without being unnecessarily specific, suffice it to say that because of obvious differences in the anatomy of the sexes, social mores in this country have for a number of years indicated that somewhat less revealing articles of apparel are necessary for women than for men when swimming. If it chooses to prescribe swimming apparel, unless an educational institution agrees that women may adopt the more revealing swimming apparel customary for men, it will be required to insist that men return to a form of bathing suit encompassing a shirt not unlike that worn by men in the early part of this century. Nothing in title IX grants to HEW the authority to restrict the ability of an educational institution to prescribe proper swimming apparel, or to limit the ability of an educational institution to establish rules relative to students' dress and appearance generally.

Subsection (c) *of section 86.31* provides that where a person or other entity (not a governmental unit within the United States) provides to an educational institution "scholarships, fellowships or other awards . . . restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates to the recipient institution," the institution cannot accept same, unless the educational institution also, from whatever source, provides "opportunities for similar studies for members of the other sex."

Comment: When a person makes a bequest in a will that a certain sum of money shall go in trust to a particular educational institution, the income from which shall be used to provde fellowships for members of one identified sex to study abroad to the exclusion of the other, that is a private act of discrimination on the basis of sex accomplished through the use of private, as opposed to Federal, financial assistance. As indicated in Part I, Section A of this memorandum, such private acts of discrimination have never been the subject of Supreme Court decisions relative to sex discrimination and only to a limited extent have they been the subject of Congressional enactments. Nothing in title IX grants to HEW any authority to regulate such private acts of discrimination on the basis of sex. Title IX only pertains to education programs and activities receiving *Federal financial assistance*.

Subsection (*d*) *of section 86.31* extends the coverage of the regulations to programs not operated by an educational institution, but participation in which is considered by the institution to facilitate one or more of its education programs or activities. The institution is required to "implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity. . ." does not discriminate on the basis of sex in a manner not permitted under these regulations to the educational institution in question. Additionally, the subsection provides that an educational institution shall not "permit" students or employees to participate in such programs or activities if the institution considers the program or activity "as part of *or equivalent to*" (emphasis added) an education program or activity rated by the educational institution. The section does *not* indicate whether it contemplates the educational institution allowing academic credit for such participation; therefore, it is necessary to assume that such participation is proscribed whether or not academic credit is allowed, or allowable.

Comment: To the extent that such program or activity not operated by the educational institution and does not receive Federal financial assistance, subsection (d) is objected to for reasons stated in Part I, Section G of this memorandum. Additionally, to the extent that subsection (d) prohibits public educational institutions from "permit(ting)" students or employees to participate in such programs and activities not operated by the institution, when no academic credit or other benefit is granted by the educational institution for such participation, the subsection is objected to as being violative of the Fourteenth Amendment to the Constitution of the United States in that it forces such public educational institution to deprive its students and employees of "liberty . . . without due process of law." Of course, neither the Department of HEW, nor any public educational institution can prohibit a student or employee from participating in a program or activity not operated by the educational institution, on such persons' own time and of such persons' own volition, simply because it is felt by such institution that such participation is "equivalent to an education program or activity operated by such institution."

In *Meyer v. Nebraska*, 262 U.S. 390 (1923) the United States Supreme Court said that liberty under the Fourteenth amendment "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire knowledge, . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Though *Meyer v. Nebraska* is a fairly old case, one would hope that the meaning of liberty in the United States is no more restricted today than in 1923, and that case specifically included the acquisition of knowledge as a right protected by the Fourteenth amendment. How then, under the Constitution, can HEW require that a public educational institution receiving Federal financial assistance so limit the freedom of its students and employees as to proscribe their liberty to participate in educatonal programs and activities offered by some other entity simply because they are felt to be equivalent to those offered by such institution? If a student wishes to participate in a program of an entity separate and apart from the educational institution in question simply for such student's own edification, and the student is duly accepted for such participation, and it is for a lawful purpose, the Constitution protects the student's right to do so. HEW should do no less.

Section 86.32. Housing—This section pertains to student housing and provides that an educational institution "shall not on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing," except that an institution "may provide separate housing on the basis of sex."

Comment: As indicated previously, title IX only grants to HEW authority to issue regulations governing educational programs and activities receiving Federal financial assistance. While some dormitories may be built with Federal financial assistance, they clearly are not either an educational program or an educational activity. Therefore, they are not within the purview of title IX, and regulations pertaining to housing are inconsistent with title IX. Citation of title VI regulations and Supreme Court cases involving racial discrimination are rejected as not being supportive of sex discrimination questions for reasons stated in Part I, Section A. It should also be recalled that as recently as May 13, 1974, the Supreme Court refused to overrule a decision of the United States Court of Appeals for the Sixth Circuit, *Robinson v. Board of Regents*, 475 F. 2d 707 (1973), Certiorari denied 416 U.S. 982, which held that differing dormitory rules for male and female students were permissible in a public educational institution under the equal protection clause. In approving separate classifications based on sex, the Court of Appeals said, "A classification having some reasonable basis does not offend the equal protection clause merely because it is not drawn with mathematical nicety."

Section 86.34. Access to course offerings—This section provides that an educational institution "shall not provide any course or otherwise carry out any of its educational program or activity *separately* (emphasis added) on the basis of sex. . . ."

Comment: While it is agreed that by the enactment of title IX, Congress intended to ensure equal educational opportunity to members of both sexes, the HEW requirement that all such programs and activities be taught in mixed classes is objected to as being inconsistent with the purpose and intent of title IX. Each educational institution, or school system, etc. is the proper unit to decide whether a particular class should be taught on a coeducational basis. The mandate of *Brown* v. *Board of Education* relative to race is rejected as not being supportive on the basis of sex, because as noted in Part I, Section A of this memorandum, the Supreme Court has refused to follow its own precedents relative to racial separation when deciding sex discrimination questions. References to title VI regulations are similarip rejected. There simply is no roccelation between the relationship of one race of people to another race of peaple, and the relationship between men and women. To assert that the correlation is the same in order to seek support for the HEW regulations is simply another exploitation of minorities to achieve the arbitrary purposes evidenced in these regulations.

Subsection (c) provides that section 86.34 "does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."

Comment: It is agreed that physical education programs offered as a part of the institution's curriculum as "education programs and activities" within the meaning and intent of section 901 of title IX. Indeed, there are numerous Court cases holding that physical training is within the meaning of the term "education." *Words And Phrases*, Vol. 14, "Education," pages 125–127. HEW's allowance of separate classes for contact sports in physical education programs is simply an admission on its part that valid, rational classifications on the basis of sex in fact exist.

Subsection (d) provides that "Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect." Presumably this provision is intended as a caveat to subsection (b) of the same section which permits the "grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex."

Comment: When the two subsections are read together, the inevitable conclusion is that an educational institution may use whatever standards it chooses to group students by ability in physical education programs, *provided* that a proportional balance of members of both sexes results in each group. Realizing that lifting barbells, doing push-ups, and chinning bars are not body contact sports and under the regulations cannot be taught in separate classes, under subsection (d), if the teachers use muscular development as the objective standard for grouping students, and if the resulting groups consist of disproportionate numbers of male and female students, that standard for grouping must be discontinued, and the teacher must select other "appropriate standards which do not have such effect." One wonders what the other "appropriate standards" would be? Clearly, it is not the purpose of title IX to require that boys and girls lift barbells together, in the same groups, and following the same pace of weight progression, but the HEW regulations say they must.

Subsection (e) of Section 86.34 provides that "Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls."

Comments: It is noted that this allowance of "separate sessions" is permitted only in "elementary and secondary schools." Therefore, in institutions of post-secondary education, the HEW regulations require that "classes . . . which deal exclusively with human sexuality" be conducted in mixed groups of male and female students. It is not suggested by this commentator whether classes dealing "exclusively with human sexuality" should be taught, not taught, taught in mixed groups of male and female students, or taught in separate groups. It is suggested that the HEW provision *requiring* that such classes be taught in mixed groups on the post-secondary level is inconsistent with title IX.

Section 86.36. Counseling and use of appraisal and counseling materials—This section prohibits discrimination in counseling students, and it prohibits the use of different materials on the basis of sex in connection with such counseling. Additionally, it provides that educational institutions "shall develop and use internal procedures for ensuring that such (counseling) materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient (educational institution) shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application."

Comment: The above provision is objected to on essentially the same grounds as were stated in connection with Section 86.21, subsection (b), paragraph (2) relative to "test or other criterion" for admission to an educational institution. Briefly, the provision places the burden on the educational institution to prove that a particular "test or other instrument" on which members of both sexes do not score equally "is not the result of discrimination in the instrument or its application." Aside from the fact that HEW is placing the burden on the defendant to prove himself innocent, HEW is additionally requiring the educational institution to do the impossible. No reasonable person contends that any particular test is a perfect measure of ability, interest, or aptitude. Tests are the product of human efforts and subject to human frailties. Surely, it is the duty of those who construct such tests to make them as nearly perfect as possible, and where a choice of several tests is available, it is the duty of the educational institution to select the one, or ones, that are most nearly perfect in validly predicting students' ability, interest, aptitude, or other factor being measured. But to require the institution to provide assurance of the validity of the test is to require an impossibility. Nothing in title IX grants to HEW the authority to promulgate such a regulation. On the contrary, it is suggested that the regulation directed conflicts with title IX in that it could result in a denial of an equal educational opportunity for members of one sex if, as the Supreme Court suggests, valid classifications on the basis of sex do exist. For example, this commentator is not prepared to say categorically that women do not have a greater aptitude for verbal exercises, and that men do not have a greater aptitude for mathematical exercises. If that is the case, the HEW denial of the use of any test showing a need for remedial classes for men in verbal exercises and for women in math exercises would result in a denial of the availability of such classes. Thus, the HEW regulations may actually require a denial of equal educational opportunity. This is clearly inconsistent with title IX.

Section 86.37. Financial assistance—subsection (a), paragraph (2) provides that an educational institution shall not, "through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex."

Comment: This provision is objected to because it seeks to limit the liberty of an educational institution to deal with entities and persons not receiving Federal financial assistance, and which are not covered by Title IX. In the above provision, HEW attempts to do indirectly that which it cannot do directly, to with: Inhibit the ability of an entity or person not covered by the Act to differentiate on the basis of sex in the provision of assistance to students.

Subsection (a), paragraph (3) provides that an educational institution shall not apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to . . . parental status."

Comment: This paragraph is objected to for reasons stated in Section A of Part I of this memorandum and for reasons stated earlier in Part II of this memorandum relative to Subsection (c), paragraph (1) of HEW section 86.21. Briefly, in *Geduldig* v. *Aiello* (1974) the United States Supreme Court refused to strike down a statute treating pregnant public schoolteachers differently from nonpregnant public schoolteachers. The Court denied that the classification was based upon "gender as such." The Court concluded that the classification was not on gender, but on the basis of pregnancy and while only women can become pregnant, that fact alone was not held to be determinative. The Court said, "The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." Therefore, differentiation on the basis of pregnancy or parental status, according to the Supreme Court, it is *not* a differentiation on the basis of sex. In short, pregnancy or parental status is a valid criteria upon which to base a classification. Neither the equal protection clause of the Fourteenth Amendment nor Title IX prohibits it.

Section 86.37, Subsection (b) provides an educational institution cannot "administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein, "unless the institutions develop and use procedures to ensure nondiscriminatory awards of assistance," and under such procedures "students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex; (and) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student . . ." thus selected; and "No student is denied the award for which he or she was selected . . . because of the absence of a scholarship, fellowship, or other form of financial assistance designed for a member of that student's sex."

Comment: When a person makes a bequest in a will, or other gift, of a certain sum of money providing that a certain sum of money shall go in trust to a particular educational institution, and the income from such sum shall be used to provide fellowship, scholarships, or other forms of financial assistance for members of one specified sex to the exclusion of the other, that is a private act of differentiation or discrimination, on the basis of sex accomplished through the use of private, as opposed to Federal, financial assistance. As indicated in Part I, Section A of this memorandum, such private acts of discrimination have never been the subject of Supreme Court decisions involving sex discrimination under the equal protection clause, and only to a limited extent have they been the subject of Congressional enactments. Nothing in title IX grants to HEW any authority to regulate such private acts of differentiation on the basis of sex.

Title IX only pertains to "education programs and activities *receiving Federal financial assistance* (emphasis added)."

Subsection (c) of section 86.37. Athletic scholarships—This subsection provides that "To the extent that an educational institution awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of such sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

Comment: Subsection (c) is objected to for reasons stated in Part I, Section (B) of this memorandum. Of course, physical education programs which are a regular part of the curriculum of the institution and for which no special skill is required for participation are unquestionable "education program(s) and activit(ies)" within the meaning of title IX. However, it is equally obvious that athletic programs of an intercollegiate nature, for which a specialized or exceptional skill is required for participation, are not "education program(s) and activit(ies)" within the meaning of title IX. As indicated, reference is made to Part I, Section (B) of this memorandum and to Part I, Section (C).

Section 86.38. Employment assistance to students—Subsection (a) provides that an educational institution "which assists any agency, organization or person in making employment available to any of its students (s)hall assure itself that such employment is made available without discrimination on the basis of sex; and (s)hall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices."

Comment: This provision is objected to because it seeks to limit the liberty of an educational institution to deal with entities and persons regarding activities that are not "education program(s) or activit(ies)." It is further objected to because it similarly seeks to limit the liberty of an educational institution to deal with entities and persons regarding activities that do not receive "Federal financial assistance." Reference is made to Part I, Sections (B) and (C) of this memorandum and to comments relative to HEW regulations Subpart E regarding discrimination on the basis of sex in employment in education programs and activities.

Subsection (b) of section 86.38 prohibits the employment of students by an educational institution "in a manner which violates Subpart E."

Comment: This provision is objected to for reasons stated in connection with Subpart E.

Section 86.39. Health and insurance benefits and services—This section prohibits discrimination on the basis of sex in the providing of medical hospital, accident, life insurance benefits, services, or plans by an educational institution. Additionally, the same may not be provided to students in a manner that would be violative of Subpart E if it were provided to employees of the institution. Additionally, any institution which provides full coverage health service shall provide gynecological care. Further, the providing of family planning services to students is mentioned with approval.

Comment: This section is objected to for reasons stated in Part I, Section (B) of this memorandum. Briefly, the plain meaning of the term "education" in section 901 of title IX does not include extracurricular programs and activities. It is equally obvious that the term does not embrace medical services and benefits, nor can it be extended to include insurance policies. To do so defies reason, and it violates fundamental rules of legal construction requiring the common, natural and customary meaning to be given the term. *Sutherland's Statutory Construction*, fourth edition, Volume 2–A, § 46.01, pages 48 and 49; Order of Railway Conductors of America v. Swann, 329 U.S. 520 (1947). Additionally, to the extent that such services and benefits do not receive "Federal financial assistance," the section is objected to for reasons stated in Part I, Section (C) of this memorandum.

Section 86.40. Marital or parental status—Subsection (a) provides that an educational institution "shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex."

Comment: This provision is objected to for reasons stated in Part I, Section (A) of this memorandum. Under this section, an educational institutional institution is prohibited from applying any rule whatsoever, or making any differentiation at all regarding students who are pregnant regardless of whether such student is married or unmarried. If an unmarried, pregnant student insists, that student must be permitted to continue to attend classes and participate in other education programs and activities until a reasonable period prior to birth of the child. This commentator would not suggest whether an educational institution should adopt such a policy, nor would he suggest whether an institution should adopt a less permissive policy. Such a decision is properly the prerogative of the particular educational institution in question. However, in view of the Supreme Court decision in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974) which held that differentiation, or discrimination, on the basis of pregnancy is not discrimination on the basis of sex, and in view of the Supreme Court decision in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973) which held that there is no Constitutionally protected right to an educational opportunity, HEW is not justified in requiring that educational institutions not differentiate on the basis of actual or potential parental status.

Subsection (*b*) *of Section 86.40* provides that an educational institution shall not discriminate against any student, or exclude any student from its education program or activity, including class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the . . ." institution. Subsequent paragraphs of subsection (b) further outline prohibitions and limitations of the institution relative to pregnancy, including the requirement that pregnancy, false pregnancy, termination of pregnancy and recovery therefrom be treated in the same manner and under the same policies as any other temporary disability with respect to medical or hospital benefits, services, plans or policies which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational programs or activities."

Comment: Subsection (b) is objected to for reasons stated in Part I, Sections (A), (B), and (C) of this memorandum as well as for reasons stated in the comments relative to subsection (a) of Section 86.40 above. Subsection (b), as indicated, requires that termination of pregnancy be treated in the same manner and under the same policies as any other temporary disability with respect to medical or hospital benefits, services, plans or policies. Therefore, HEW requires that the educational institution's medical benefits cover students' abortions. Additionally, as noted earlier, the institution is not permitted to consider the marital status of the student. The institution's medical benefits must provide abortion coverage to both married and unmarried students. There is obviously nothing in title IX granting such authority to HEW. Further, in *Geduldig v. Aiello* (1974), cited previously, the Supreme Court has held that differentiation on the basis of pregnancy is not discrimination on the basis of sex.

Section 86.41. Athletics—This section provides that "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by . . . "educational institutions," and no educational institution shall, except as allowed in subsection (b), provide any such athletics separately on such basis.

Comment: This entire section pertaining to athletics is objected to for reasons stated in Part I, Sections (A), (B), and (C) to the extent that such athletics are not regular elements of the physical education program within the curriculum of the institution. Clearly, athletics beyond the physical education class level are not within the meaning of the term "education" as used in section 901 of title IX. Additionally, to the extent that such programs and activities do not receive Federal financial assistance, they are not covered by title IX even if they were deemed to be within the term "education." It is noted that HEW, in addition to citing sections 901 and 902 of title IX, also cites section 844 of the Education Amendments of 1974 in support of the inclusion of athletics within the regulations. The citing of section 844 is rejected as not being supportive of such a grant of authority to HEW, because section 844 does not purport to amend title IX of the Education Amendments of 1972, nor does it do so. As such, it is not a delegation of authority from the Congress to the Secretary of HEW; and therefore, it is not substantive law applicable generally to citizens of the United States. Section 844 is a directive from Congress to the Secretary of the Department of Health, Education and Welfare, and it is applicable only to the Secretary. Further, as a directive from the Congress, it can properly be reviewed by Congress, and it can be retracted, amended, or ratified. A proper means available to the Congress for such review is a Concurrent Resolution submitted pursuant to section 431(d) of the General Education Provisions Act.

SUBPART E

DISCRIMINATION ON THE BASIS OF SEX IN EMPLOYMENT IN EDUCATION PROGRAMS AND ACTIVITIES PROHIBITED

This entire Subpart of the HEW regulations pertains to employment of individuals by the educational institution. While it is recognized that the phrase in section 901 of title IX respecting "participation in . . . any education program or activity . . ." may arguably be interpreted to include those who teach such activities, it is the view of this commentator that such a conclusion is not mandated by the language of title IX.

Additionally, section 703 of the *Civil Rights Act of 1964* as amended by the *Equal Employment Opportunity Act of 1972* specifically provides that "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex. . . ."

Section 705 of that Act created the Equal Employment Opportunity Commission, and section 706 of such Act empowers the Commission to prevent any person from engaging in any unlawful employment practice as set forth in section 703. . . ."

Clearly, the Equal Employment Opportunity Commission, not HEW, is the proper agency of the Federal Government to consider questions of possible discrimination on the basis of sex in employment. And, of course, its power and authority governs educational institutions as well as other employers. On April 5, 1972, the Commission published in the *Federal Register* regulations, or guidelines relative to discrimination because of sex. Those regulations are, of course, currently in effect.

In the light of the authority, jurisdiction and work of the Equal Employment Opportunity Commission, it is submitted that the better reasoned view is that Congress did not intend for title IX to be extended to cover employees of educational institutions. Rather, it is suggested that Congress intended the *Equal Employment Opportunity Act of 1972* to cover such matters. It is noteworthy that both Acts were enacted in the same year. Therefore, it is submitted that the proper agency of the Federal Government to promulgate regulations respecting discrimination on the basis of sex in employment is the Equal Employment Opportunity Commission, not HEW.

In the light of the two previously mentioned enactments of 1972, it would defy common sense to conclude otherwise. Further, simple principles of good management and economy in government require that competition among Federal agencies which have a duplicative effect not be permitted.

STATEMENT OF THE EASTERN ASSOCIATION FOR INTERCOLLEGIATE ATHLETICS FOR WOMEN

The Eastern Association for Intercollegiate Athletics for Women (EAIAW) was formed in 1972 to provide direction and leadership for women's intercollegiate programs. The Association administers regional championships in a variety of sports for women. EAIAW, with a membership of almost 200 institutions, serves as the eastern regional structure for the Association for Intercollegiate Athletics for Women (AIAW). The purpose of the organization is to foster broad programs of women's intercollegiate athletics which are consistent with the educational aims and objectives of the member schools. It has been instrumental in encouraging high caliber programs, extending and enriching programs for female athletes which are based upon the focus of the individual participant in her primary role as a college student.

This Subcommittee is inquiring into the consistency of Title IX regulations with the authorizing legislation, Title IX of the Education Amendments of 1972. Much has been testified to with respect to particular athletic programs. EAIAW urges the Subcommittee to not be sidetracked by these issues, but to squarely address the principal concern, the consistency of the regulations with the statutory authority therefor.

Despite what has been urged by a number of organizations, athletics, and particularly intercollegiate athletics, are programs and activities intended by

Congress to be covered by Title IX. An examination of the legislative history of Title IX establishes that intercollegiate athletics was well within the contemplation of the enactors of that legislation as programs and activities to be covered. Senator Birch Bayh made specific reference to the inclusion of sports facilities and intercollegiate athletic programs. Representative Green's hearings made repeated references to intercollegiate programs. Most importantly, the directive of the General Education Amendments of 1974 set forth that:

> The Commissioner shall prepare and publish, not later than 30 days after enactment of this Act, proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include, with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.

Once this Subcommittee satisfies itself, as indeed it must, that the regulations are fully consistent with the legislation, the Subcommittee should support the enactment on July 21st of the regulations. Without these regulations, historical prejudices and blatant discrimination against women in competitive athletics shall be permitted to abound in the male-dominated governance of competitive athletics. EAIAW strongly supports the regulations insofar as they implement the concept of equal opportunity regardless of sex. The effectuation of the Title IX regulations on July 21st shall serve as the vehicle by which women can begin to have better access to competitive athletics—and hopefully eventually acquire equal access—and have an historic opportunity to remedy and overcome the disincentives and disadvantages under which women's competitive athletics have been forced to function.

As an organization, EAIAW is firmly committed to competitive athletics as an integral part of the educational program at all colleges. Indeed, EAIAW believes that the primary justification for intercollegiate programs is their education, not their financial value. The NCAA has defined its basic purpose:

> ". . . to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body, and, by so doing, retain a clear line of demarcation between college athletics and professional sports." (Article 2, Section 2 of the NCAA Constitution)

The NCAA, however, has argued, somewhat contradictorily, that while their program is education, the financial aspects of college sports demand that a portion of the men's intercollegiate program should be exempt from Title IX because it is revenue producing, or in the alternative, that the entire program of intercollegiate athletics should not be covered by Title IX. The rationale for this position is twofold: (1) intercollegiate athletics do not receive direct financial help from the federal government, and (2) the present economic crisis makes it impossible to implement the regulations set forth by HEW without jeopardizing men's intercollegiate athletics, and interfering with the financial success of the men's intercollegiate programs of individual member schools. If making profits is indeed the primary objective of competitive sports, it does not have a place in the educational setting and should not only be exempt from Title IX, but should be eliminated from higher education altogether. It should be carried on as a business and solely as a business. If, on the other hand, as the NCAA has stated, the primary goals of its program are educational, there is no justification for exemption of any portion of that program on the grounds of financial difficulty in compliance.

There is no judicial precedence, nor legislative authority which would allow convenience, or economy as a basis for inviting and tolerating sex bias in educational programs. The intent of Congress in enacting Title IX was the adoption of legislation which would eliminate discriminatory actions wherever they exist in education. Title IX was passed because it was recognized that the federal government should not support educational programs that deny equal opportunity to one group of citizens. To move in any direction which would continue to invite the widespread discrimination which is present in intercollegiate sports for women would violate the clear mandate of the statute to eliminate sex discrimination in all facets of education.

With respect to the issue of federal monies in intercollegiate athletic programs raised by the NCAA and various individuals and professional education groups, EAIAW fully supports AIAW's testimony of June 20, 1975, concerning the intention to include athletics in the coverage of Title IX as it ". . . was resolved by the directive in the General Education Amendments of 1974 that:

> "The Commissioner shall prepare and publish not later than 30 days after enactment of this Act, proposed regulations implementing the provisions of

Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities, reasonable provisions considering the nature of the particular sports."

EAIAW holds the belief that federal funds are both directly and indirectly used for programs which involve intercollegiate athletics. In those situations in which there is little or no federal spending, there are still definite evidences of the entire college community being "infested" by the sex bias in an educational program which has so much visibility and is such a vital part of the climate of learning in any single institution of higher education. The flagrant discrimination which abounds in intercollegiate athletics is perhaps the most obvious form of demoralization of a particular group to be found in education. Such negative attitudes towards female athletes and females in general on a college campus is bound to affect their self-image and to label them second-class citizens. Yet these women have been mandated to give their fee dollars to support a program which spends most of their fees for men's athletics. The realization of a return of 50 cents to $1.00 on a $30.00 fee is a blatant offense for women students to accept.

In addition to the general visible evidence of discrimination in athletics, women on many college campuses are deprived of equal access to facilities. This discriminatory action affects both the general woman student and the female athlete, i.e., in the football stadium of a large university, the track surrounds the stadium. The female student may not use any of the facilities of the stadium including the track for jogging, the training room and washrooms during the practice of the male football team, or during the track practice of the male team. At the same time, the male non-athletes may have access to the track and all of its facilities. Even as the women are permitted to practice on the track (over the supper hour, as the male team has the prime practice time), there are no facilities made available for showers, use of a washroom, or training room. This necessitates a two-block walk to shower and restroom facilities. At the same time, the men's track and field team has the use of two shower rooms, and plenty of washroom facilities. Such action is bound to affect the psychological well-being of students and label them obviously second-class citizens. In *Finch v. Florida*, 414 F.2d 1068, 1078–79 (5th Cir. 1969), the court's interpretation demonstrates the possibility that discriminatory action in one area of the school program (in this case perhaps non-federally supported competitive athletics) may have effects on other aspects of the program. Although this recognition came under Title VI, the concept of "taint" or "infection" is equally relevant to problems of sex discrimination under Title IX.

It is often impossible to trace the federal dollar, or to assume that intercollegiate sports do not either directly or indirectly receive federal support. Certainly, many facilities used in intercollegiate athletics are shared by Physical Education, Recreation and Athletics and have been built in part by federal subsidy or revenue sharing. Tracking the federal dollar precisely can be extremely complicated, sometimes impossible. A projector and video is gained through funds of ESEA and used by male or female tennis team to help in demonstrating performance errors. The federal government has thus provided the means for a coaching aid in intercollegiate sport. This item supported by federal funds prevented intercollegiate athletics from having to purchase such a projector or video tape. This is a clear example of how federal aid to one school activity can be indirect financial assistance to other school activities. In other cases, if federal funds are not available for a given activity, local and state funds would have to be diverted to support that activity. This may be indirectly helpful to support school sports programs.

Who pays the deficit of NCAA member schools in conducting intercollegiate athletic programs? A memo from NCAA states that intercollegiates have an annual deficit of $49.5 million. Who picks up the tab at individual institutions for these deficits? The funds must come from sources within the university, funds which may have been saved as a result of federal support in some other area of the educational programs.

The disadvantages under which women's intercollegiate athletic programs operate are most apparent in the dollars expended on those programs. The most casual examination of almost any athletic budget will reveal blatant discrimination in allocation of funds for women's intercollegiate programs. There is not a single major university which spends over 3½ percent of their annual athletic budget on women's programs. A majority of the athletic budgets reveal a figure close to 1.5–2 percent of the total athletic budget. The 1.5–2 percent is a 100 percent increase over budget allocations pre-1973 when colleges and universities began to be concerned about the possible future requirements of the Title IX regulations. Many women's collegiate aithletic programs have had substanital gains in a relative sense, but the new expansion of interest in competitive sports by female athletes exceeds the funds being made available. Before the enactment of Title IX, not a single large university spent more than $100,000 on their women's athletic budgets. Recent changes have forced increased funding.

A 1974 University of Minnesota survey, for example, inquired into the administration and funding of "Big Ten Conference and State Universities." The survey indicated that expenditures for women's programs ranged from a low $3,000 at Northwestern University to a high $110,000 for Michigan State. At other large universities where the annual athletic budget for men is over $1.5 million, representative total budget allocations for 1974–75 to women include: University of Southern California, $100,000; University of Maryland, $42,000 (HEW suit pending); University of Michigan $110,000 (after a complaint was filed in August, 1973 to HEW); University of New Mexico, $36,000; University of California at Berkeley, $42,000; Washington State, $18,000 (new figures suggest near $110,000 for 1975–6 budget); Ohio State, $42,000; and University of Arizona, $37,000.

Constant reference was made by the NCAA in its testimony before the Subcommittee concerning the historical growth and development of men's intercollegiate sports and the threats thereto by the development of women's intercollegiate athletics. In a report to its member schools, the NCAA has reminded its members to "Finally hammer the impossibility of meeting the requirement of overall program equality for men and women without severe curtailment of men's programs which you have built carefully over many years." It needs to be clarified that the men's programs have grown, in part, because women have contributed financially through state taxes, tuition, and student fees towards men's programs with NO return on the sum paid for women's intercollegiates. Discrimination against women in athletics has helped support men's programs and thus men have profited by the flagrant discrimination of women in intercollegiate sport. It is repugnant to the ideals of fairness and equality to openly continue to support concepts which lead to such discrimination of nearly 50 percent of the student body. Women have paid the price for the growth and flourishing of men's athletic programs, and it is time for that support to be given to women's programs.

What is the logic of supporting men's nonrevenue sports and not the women's nonrevenue sports when both groups have made contributions to the finances of the program? Certainly sports are a reflection of society, and when society did not accept the female athlete, it is understandable that discriminatory actions abounded; but the new generation of students no longer look to athletic stereotyping, and this fact has opened wide the door for competitive athletics to be an acceptable part of a women's life-style. There must be a concerted effort to overcome the attitudes of the past and help the female population come to know the joy of effort, higher levels of achievement, and the values in pursuit of excellence through sports in our colleges.

It is obvious that if additional funds are not available, the development of competitive athletics for women may necessitate some curtailment of men's competitive athletics. In most cases, this could be solved by simply more logical expenditures and procedures. This may be the opportune time to examine and evaluate the competitive athletic programs within each college and university. The goals of these programs may require re-direction in order to be more consistent with the function of higher education which has as its focus the quality of the experience for the students, both male and female, and not for the revenue to be produced in the educational setting.

In the hearings of the Subcommittee on Post-Secondary Education, Friday, June 20, 1975, the NCAA proposed that there be an in-depth study of the practical impact of Title IX before the HEW regulations are accepted. AIAW and EAIAW have already examined the practical impact of the Title IX regulations on both men's and women's sports and can see no real concern for the disaster predicted by NCAA in enactment of Title IX. Naturally, we cannot, nor can anyone else, predetermine all problems which might arise, as only experience and functional operation of the guidelines can determine the exact nature of difficulties, and can then resolve them. It seems clear, however, that the call by the NCAA for still another study period is nothing more than a stall tactic designed to prevent sex bias in competitive athletics from being eliminated as soon as possible. A study can be undertaken simultaneous with enactment of the regulations.

Certainly, EAIAW would be the first to suggest and support a well-coordinated, highly professional research program to ascertain and document answers to some of the important questions, such as integrated vs. separate team. We cannot see a reason for wating on the results of such a study to enact Title IX regulations, women's intercollegiate athletics cannot afford to await any longer, not even a year, while future modifications or possible impact of the regulations are studied. Every day of delay prevents another generation of college female athletes from receiving the access to education that is afforded male counterparts. Pending investigations and the large number of litigations and complaints filed in HEW demonstrate the urgency of immediate passage to provide the enforcement powers for HEW, to assure equality of opportunity for male and female student athletes.

Some members of the Subcommittee and the NCAA expressed concern for the interest factor in women's sports. In a letter to Chief Executives of member schools, NCAA and the NACDA attempted to ascertain the interest of women in sports while implying that women's programs were not highly successful and lacked importance to female student athletes. Questions were asked concerning the possible spectator interest for women's sports in the future. EAIAW does not consider having spectators as an important part of the educational experience essential to the participant. We do recognize, however, the possible interest of society as spectators and believe such an interest is possible through well publicized and sound intercollegiate programs.

The degree of interest in competitive athletics for women is definitely growing. This is demonstrated by the number of teams who desire to participate in regional and national championships and the number of colleges joining AIAW and regional organizations. There is statistical evidence of the large increase in women's participation in intercollegiate athletics; the ever-expanding coverage of news media is further evidence of interest on the part of participants and spectators alike. The variety of sports which have national championships is growing as is the number of teams in the regional championships. In the team sports of volleyball and basketball, for example, profits have been made and the facilities for the championship were filled to capacity. In the EAIAW basketball championship, spectators were turned away as early as 30 minutes before the game. The same situation was found in the finals and semi-finals of the National Basketball Tournament this year in Virginia. All championships in the women's events have had sellout finals in those areas in which spectators pay an admission fee. Iowa certainly stands as evidence of the spectator interest in women's basketball even during the era of "play days and sports days" for women instead of intercollegiate competition. NCAA may well be aware of the potential of basketball for women as a revenue producing sport as they begin to make plans to offer their own championships for women of NCAA memberships schools. All reports on the number of women in intercollegiate sports indicate growth patterns in excess of those of the men and often 100 percent gains in numbers. It is very clear that women wish to be given equal opportunity in the intercollegiate scene.

At the Friday, June 20, 1975, session of the Subcommittee's hearings, Representative Mottl questioned the AIAW President as to the memberships understanding of the impact or ramifications of Title IX. Mr. Mottl further suggested that AIAW had historically been against some of the requirements which would be mandated as a result of the regulations.

EAIAW cannot speak for the entire AIAW membership, but the cooperative structure between the two groups permits some generalizations for both groups. AIAW and EAIAW member schools are very cognizant of the ramifications of Title IX. Both groups have studied the various drafts, and have carefully evaluated the contents both at the functional operation level, the legal implications of the competitive athletic portion of the bill, and our own philosophical positions. Much time and effort has been devoted to evaluation and request for revisions for the competitive athletic portions of the title, and to keeping its memberships informed of progress on behalf of its member schools.

Within the membership of AIAW and EAIAW are persons with a diverse range of views, as is true of any large organization. Our history is one of caution: yet there is one unifying principle that needs to be made clear. AIAW and EAIAW have continuously, in all the various drafts, *unanimously voted* to support the immediate enactment of Title IX. Admittedly, there have been philosophical differences among members concerning the dichotomy between the men's and women's philosophy of competitive athletics in the area of commercialization of intercollegiates. Many members of EAIAW and AIAW may continue to strive to prevent scholarships from being awarded to females, and accordingly to prevent their being awarded to males, as one of many means in an effort to decommercialize intercollegiate athletics. Nevertheless, all members agree that the primary concern is to promote all possible means for gaining access to opportunity for the women athletic participants and believe that the provisions of the Title IX regulations provide the basis for making this access possible. As stated by the AIAW President, women's intercollegiate programs are attempting to develop programs that are not a "carbon copy" of the men's. ". . . We believe this can be done within the structures of the law, including the provisions of the Title IX regulations. It could be every bit as discriminatory to force women into the programs and patterns established by men for men as to preclude participation of women entirely. Women must be permitted to develop and participate in athletic programs designed by them, for their needs and their interests. We believe this is the spirit of Title IX and the regulations promulgated by HEW are a start in that direction."

The actions of AIAW and EAIAW in each of their Delegate Assembly meetings is unanimously passing the following resolution on separate teams is fully consistent with the provisions of Title IX regulations:

> Be it resolved: There *shall be* separate teams for men and women. No male student may participate on a women's intercollegiate team. No female student may participate on a men's intercollegiate team. In addition to separate teams for men and women, intercollegiate mixed (co-ed) teams composed of an equal number of males and females competing on opposing teams are DESIRABLE in those sports in which such teams are appropriate.

Some of the rationale offered for this resolution were:

I. MEN NOT PERMITTED ON WOMEN'S TEAMS

A. Men on women's teams prevent equality of opportunity due to the physiological differences between the male and female. There are several physiological functions which impose limitations on the female, especially in regard to strength and speed in performance.

1. The female hormone *estrogen* results in inhibiting the growth of muscle tissue while increasing the amounts of adipose tissue. The male hormone *androgen* enhances the growth of muscle tissue. The ratio of strength to weight is much greater in the male than the female. Conditioning may enhance the development of muscle mass and minimize the amount of adipose tissue of female athletes. It should be clear, however, that physiological differences dictate that the male athlete will not ony remain superior in sports requiring muscular strength and speed, but also be able to reach a higher level of training because of these factors.

2. Maximal oxygen uptake (maximal aerobic capacity) is lower in the female than male. Maximal oxygen uptake is a function of both the cardiovascular and respiratory systems and is thus limited by the individual's response to a stress variables related to these systems. An adult female has a lower level of hemoglobin and erythrocytes, and since a female is generally smaller than a male, she also has a smaller heart thus less cardiac output. In addition, she has a smaller lung volume, therefore a smaller vital capacity. However, the smaller organs do not necessarily prevent her from developing an efficiency comparable to that of the male. When evaluating maximal aerobic power on the basis of working muscle, the female can develop the ability to utilize approximately the same amount of oxygen per kilogram of body weight as the male. The problem, however, is the female has to carry her weight, muscle mass and FAT with her when she performs. Therefore, even though she may be as efficient as the male with regard to oxygen uptake in the working muscle, she still has to provide oxygen to her fat tissues as well. This tends to decrease her overall efficiency.

3. Factor analysis studies make apparent the importance of the strength component in all competitive athletics, and the relative importance of the speed factor in most competitive athletics. There is an overlap in the strength and speed factors between male and female; that is, all males are not stronger and have more speed than all females. The problem lies, however, in the reality that the overlap occurs in the higher end of the female distribution and the low end of the male distribution; therefore, females of above average strength cannot compete equally with males who are above average in strength. The same overlap would be true in a study of the speed factor. These facts are significant in intercollegiate competition where we are dealing with top level performance.

B. The cultural concepts of the female athletes in our society have been a factor which has affected their performance attainment in the past and the residue will continue for years to come. This is an additional disadvantage to the women athlete who must compete with the more experienced male athlete for membership on a single team. The lack of experience is another deterrent to her athletic success on a single team composed primarily of males.

II. WOMEN NOT PERMITTED ON MEN'S TEAMS

A. The policy of permitting women on men's teams is discriminatory to men. If a woman can take a man's place on HIS team but he cannot take a woman's place of HER team when he is superior to the woman in athletic ability, this is a discriminatory action.

B. Single teams will destroy equality of opportunity because the large majority of women will be excluded from this competition. The present policy encourages colleges and universities to avoid the responsibility of providing women's teams.

* * * * * * *

D. Women desiring to be participants on men's teams reflect an assumption of inferiority of programs, or lack of a program. Neither of these cases SHOULD be tolerated. There must be concerted effort to provide top level competition for female athletes and to provide them with programs which do have comparable monies, schedules, facilities, equipment, medical care and coaching. Excellent women's athletic teams which are designed specifically for the sex-based classification of the women athlete can result.

The courts have declined to differentiate on the basis of sex inherently violative of the Constitution while requiring, at the most, that "strict judicial scrutiny" (*Frontiero v. Richardson*, 411 U.S. 677, 1973) be given such classifications. The relevant judicial precedents, however, in no way preclude the offering of separate athletic programs for men and women so long as such differentiation is reasonably related to the achievement of a valid educational objective. The preservation of competition in sports programs has been held to be such an objective. To require that all non-competitive activities be co-educational is to achieve procedural equality at the quite possible expense of substantive inequality unless men can be barred from the separate women's teams in the open team concept. The option of permitting women to have a separate team in all sports both contact and non-contact where there is any interest in such participation, regardless of the policy of women on men's teams, is essential to the process of achieving substantive equality for female students. If a single team exists it would almost always be predominantly a men's team as the best women athletes generally will not be as good as the best male athletes in those sports which demand strength and speed.

EAIAW realizes that "reasonable opportunity" relative to the number of athletic scholarships and grants-in-aid was purposely used to permit some flexibility in the policies of various institutions for granting aid to women athletes. Yet it must be clarified in order that definitive direction be given to individual instituitons. Similarly, interpretation is necessary in regards to "awards for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics."

The situation may well arise in which affirmative action has been taken on a campus and the "benign" principle applies to make possible both a junior varsity and a varsity team for women while the male student had a single team. This might result in the total number of female athletes surpassing the total number of men in the intercollegiate program. This would mandate that more scholarships be given to women students than men. It seems obvious that this was not the intent of the regulations; and in fact perhaps just the opposite was intended: that is fewer scholarships would have to be given to female athletes than male athletes. This would be more in keeping with the desire of EAIAW to demand as few scholarships as possible for those institutions who wish to develop a model in which the primary emphasis on the pursuit of excellence for its own sake. There is a need for clarification of the intent of the regulations in this regard.

In conclusion, EAIAW urges the Subcommittee to support the immediate enactment of the regulations. The regulations will generally be conducive to the promotion of equitable and quality athletic programs for all individuals. In two areas, however, the regulations fail to implement the general policy of equal opportunity for women in athletic programs underlying the Education Amendments Act of 1972, therefore, EAIAW urges the Subcommittee to request HEW to make the following changes in its regulations at the earliest opportunity.

(a) The addition of a provision for completing a grievance process with 90 days for filing a complaint with the institution.

(b) Amending the period by which collegiate institutions will be required to come into compliance to a time not to exceed one year, thereby requiring institutions of higher education to come into compliance at the same time as elementary and secondary schools.

These modifications are designed to expedite the process of assuring the present generation of college students equality of opportunity in sports, without which it may be another generation of students before the benefits of Title IX legislation are realized. On behalf of women and women athletes, EAIAW urges the immediate adoption of the Title IX regulations, with suggestions for changes at the earliest opportunity, and the consequent full implementation of equal opportunity in all phases of education.

APPENDIX

1. AIAW and DGWS, "Resource Paper Relating to Title IX," Answer to NCAA and NACDA Memorandum of Feb. 21, 1975 (Unpublished Material)
2. AIAW "Summary of Actions Taken by AIAW Regarding Title IX Guidelines," Report to member institutions from the President, June, 1974 (Unpublished Material)
3. Adrian, Marlene, "Sex Differences in Biomechanics," *Women and Sport Proceedings of A National Research Conference on Women and Sport*. The Pennsylvania State University Penn State HPER Series No. 2, 1973.
4. Drinkwater, Barbara, "Maximal Oxygen Uptake of Females." *Women and Sport Proceedings of A National Research Conference on Women and Sport*. The Pennsylvania State University Penn State HPER Series No. 2, 1973.
5. Dotson, Charles, "The Factorial Structure of Neuromusclar Skills Acquisition," A Faculty Research Grant, U. of Maryland (Unpublished Material).
6. DGWS Column, "First AIAW Delegate Assembly" *Journal of Health, Physical Education and Recreation*, June, 1973.
7. Harris, Dorothy, "Conditioning for Stress in Sports." Paper presented at the sixth annual Symposium—Medical Aspects of Sports, Feb. 10, 1973. Reported in DGWS Research Reports: Women in Sports, Volume II, AAHPER.
8. Hult, Joan, DGWS "Separate, But Equal Athletics for Women," *Journal of Health, Physical Education, and Recreation*, June, 1973.
9. Hult, Joan, DGWS "Competitive Athletics for Girls—We Must Act," *Journal of Health, Physical Education and Recreation*, June, 1974.
10. Huelster, L. J. "Administration and Funding in Big Ten Conference and State Universities," University of Illinois, 1974 (Unpublished Material).
11. NCAA and NACDA "Memorandum" Chief Executive Officers, February 21, 1974 (Unpublished Material).
12. Schaffer, T. E., "Physiological Considerations of the Female Participant." *Women and Sport Proceedings of a National Research Conference on Women and Sport*. The Pennsylvania State University. Penn State HPER Series No. 2, 1973.
13. Thomas Clayton, "The Female Sports Participant: Some Physiological Questions" *DGWS Research Reports: Women in Sports* Volume I, AAHPER, 1971.

STATEMENT OF JAMES A. HARRIS, PRESIDENT, NATIONAL EDUCATION ASSOCIATION

The National Education Association is pleased to testify before this Subcommittee on the federal regulations implementing Title IX of the 1972 Education Amendments. NEA worked to ensure passage of the original legislation and submitted comments last fall to the Department of Health, Education, and Welfare urging the development of strong, effective regulations.

Although other federal nondiscrimination laws have previously prohibited sex discrimination in educational employment, Title IX is the first and only legislation to prohibit sex discrimination against students in federally assisted educational programs. More than 60 million students enrolled in programs from early childhood through higher education will be affected by this coverage. Title IX is truly a milestone in the quest for equality in education.

Sex discrimination in education admissions, vocational education programs, counseling and guidance materials, and mandatory maternity leave for female employees was recognized by Congress as significant denial of equality for women. Potential effectiveness of the regulations now before this Subcommittee cannot be overemphasized, although they do not speak to all the sources of sex bias in education. Nonetheless, we believe that this is the beginning of a good faith effort on the part of HEW to enforce the Congressional intent of Title IX.

Recognizing that the purpose of these hearings is to determine only whether or not the regulations conform to the intent of the law—and we believe that they do—we would like to point out several areas which we feel deserve special commendation.

In our initial comments on the proposed regulations, NEA urged that institutions be encouraged to begin a self-evaluation process to identify overt and covert forms of discrimination within our agencies and institutions and initiate voluntary efforts toward compliance with the law. We are pleased to note that the final regulations have incorporated that recommendation.

The NEA is also pleased to see that HEW modified its proposed requirement for use of an integral grievance procedure prior to the filing of a complaint with HEW. Although such a requirement was not in the initial draft of the regulations, it was reported to have been a part of the regulations submitted to the President earlier this year. We found no legislative history to justify such a requirement and are gratified that it is not included in the final document's provision regarding internal grievance procedures.

Certainly, there are areas which HEW might have emphasized more strongly. For instance, there are still no provisions requiring review of sex bias in textbooks and instructional materials nor is there any provision for equal benefits in retirement plans for employees, nor for the development of essential inservice training programs for school personnel. In addition, we are concerned that HEW has not yet established an active, aggressive record in relation to the enforcement of Title IX. In the nearly three-year interim between passage of the legislation and the release of these regulations, millions of students and employees have been denied full equality. With the release of the final regulations which implement the intent of the law, the issue of enforcement will now become paramount.

Since the passage of Title IX, 18 states have moved toward increasing equality through the passage of some form of legislation dealing with sex equality in education. In addition, at least eight state laws or administrative mandates move beyond the proposed Title IX regulations in their requirements for affirmative or remedial action in both employment and educational programs. These actions reflect growing recognition of the urgency of the matter. We cannot afford to delay, and face the passage of another school year without beginning the difficult task of moving toward sex equality in education.

We would hope that the hearing record of this Subcommittee and of the other Committees involved will establish a focus for future Congressional oversight. NEA has begun an active information and training program for notifying our membership of the new regulations and the implications for schools. We are hopeful that with the watchful assistance of the Congress, private organizations, and individuals, HEW will implement the regulations quickly and fully so that sex equality can become a reality in our educational agencies and institutions.

STATEMENT OF KEVIN BILLINGS, INTERN WITH REPRESENTATIVE JACK EDWARDS, FIRST DISTRICT OF ALABAMA

Mr. Chairman, Members of the Subcommittee, when discussing equality in expenditures of athletic departments for women's intercollegiate athletic programs, it necessary to consider an institutions ability to support not only its women's athletic program, but its entire athletic program.

Mr. Chairman, on June 17, 1975 your witnesses included coaches from the American Football Coach's Association. This list of coaches, Darrel Royal, Bob Blackman, Jerry Claiborne, Frank Kush, Tom Osborne, Bo Schembechler, Mike White, and Joe Yukla, all coach for National Collegiate Athletic Association (NCAA) Division I schools (major colleges and universities). In their testimony they stated the need for women's athletics, but stressed the fact that the universities could not support a women's athletic program at a level comparable to the men's. This inability to support an equal women's athletic program is even more of a burden on NCAA Division II schools and National Association of Intercollegiate Athletics (NAIA) schools.

Unlike larger schools, the athletic programs at small colleges throughout the nation are not self-supporting, as are the programs mentioned by the coaches on June 17. Also small colleges, to run both their men's and women's athletic programs at a break-even level are receiving Federal aid and therefore would be directly influenced by the provisions in Title IX. Even with the added funds provided by Federal aid a large number of small college athletic programs are being run at a deficit.

Mr. Chairman the provisions in Title IX would not advance the women's athletic programs at these smaller schools, but would force these institutions to eliminate *all* athletics from their list of extracurricular activities. Obviously you and the members of the Subcommittee realize the importance of intercollegiate athletics as a viable part of higher education or you would not be discussing it.

At most colleges and universities the athletic departments do not oppose women's athletics. In fact they are quite supportive and are willing to increase funds for women's athletics based on their need. Immediate equality for women's athletics is unreasonable because at most schools the women's programs do not need equal budgets and do not ask for them. Perhaps a graduated equality would need to come about when interest in women's intercollegiate athletics is equal with that of men's program, but until that time women's athletics should be funded on the basis of their need.

Mr. Chairman, the problem seems to be that small colleges, NCAA Division II and NAIA schools, directly effected by Title IX will have to eliminate athletics completely if Federal regulations by H.E.W. are enforced across the board.

It is my suggestion that a Federal agency be set up to look objectively at individual institutions on a case by case basis and decide whether it is making adequate allotments for women's intercollegiate athletics; then if not, suspend their Federal aid or whatever is necessary.

Mr. Chairman, women have an equal right to all the benefits of intercollegiate athletics. But to pass across the board legislation on all athletic programs at all institutions would be unfair not only to men's athletic programs but also to women's. Therefore special provisions should be made in Title IX for small colleges which will carry the brunt of its effect.

STATEMENT OF THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.

The National Federation of Business and Professional Women's Clubs, Inc., is pleased to have this opportunity to present its views on the final regulations for enforcement of Title IX of the Education Amendments of 1972.

Our organization is composed of nearly 170,000 working women who reside in every one of the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Ever since our inception in 1919, the National Federation has placed equality of educational opportunity high among its goals. One of our major Federation objectives is directly related to this subject: To extend opportunities to business and professional women through education along lines of industrial, scientific, and vocational activities.

Many of our members are actively involved in rooting out sex discrimination where is exists in education, and in promoting the development of new opportunities for women to put them on an equal basis with men.

The elimination of sex discrimination in education is a major item on our National Legislative Platform and we strongly supported passage of Title IX. Because many of our members are teachers and educators, our interest includes equality of educational employment as well as equality of educational opportunity.

We were particularly pleased that Title IX was enacted because we felt this indicated that Congress was truly aware of the magnitude of the problem, and that Federal government support of equality of educational opportunity would have a tremendous impact.

We have been greatly distressed by the fact that three years have passed without regulations for enforcement of Title IX. While passage of legislation is important, it means little if there is no enforcement.

It is unreasonable to expect that much movement can be made toward implementing Title IX, or that enforcement can truly begin, without the existence of guidelines.

Therefore, we strongly believe that the final regulations issued by the Department of Health, Education and Welfare should be permitted to take effect.

While these regulations are not all that we had hoped they would be, while we would like to have seen more comprehensive and far reaching guidelines, we still think it is crucial that they take effect in their present form so that enforcement of this most important law can begin—now.

Already too many young women and girls who would have been affected by Title IX have passed through the educational system without the benefit of educational opportunities taken for granted by young men and boys. Since passage of Title IX in 1972, too many opportunities have been lost, too many doors have been closed, too many lives have been altered because of sex discrimination in education.

While these past opportunities may never be recovered, it is important that there be no more delay, that no more girls and women be adversely affected simply because they were born female. Congressional acceptance of the regulations in their present form will assure that a beginning can be made now to develop the talents and aspirations of a sizable portion of our population.

We would like to comment briefly on the matter of athletics, a subject which has, in our opinion, received a disproportionate amount of publicity. We believe that athletics and sports programs are an important part of the education and development of the whole person, male or female. We agree that athletics are an integral part of an institution's educational program, and that they should be covered by Title IX.

In conclusion, we urge that Congress allow the regulations, in their present form, to become effective in July.

ASSOCIATION OF SOUTHERN BAPTIST COLLEGES AND SCHOOLS

RESOLUTION

Whereas, representatives of the 53 colleges and universities who are members of the Association of Southern Baptist Colleges and Schools, did meet in Nashville, Tennessee, on Thursday, September 26, 1974; and

Whereas, in session, serious consideration was given to the proposed *regulations* for the implementation of TITLE IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs; and

Whereas, it is the concept of these assembled representatives of the Association of Southern Baptist Colleges and Schools that the present *regulations* present problems with regard to educational policies; the terms "comparable," "equal," "reasonable," and "proportionate," all of which appear throughout the proposed *regulations* are open to varying interpretations; and

Whereas, these interpretations may differ anywhere from slightly to significantly, depending on whether the interpretation is made by the Department of Health, Education, and Welfare, by the college or university administrators, or by the students; and

Whereas, the possibility exists that unless the terms are clearly and specifically defined in the *regulations*, actions based upon such varying definitions may be arbitrary and even capricious; and

Whereas, it is the basic concept and conviction of the Assoication of Southern Baptist Colleges and Schools to honor and respect each of God's creations; and

Whereas, some provisions of the proposed *regulations* for the implementation of the provisions of TITLE IX of the Education Amendments of 1972 violate the spirit of positive Christian commitment thus creating moral and Christian conflict with the same, as it relates to the basic health, safety, honor, respect, and position of all persons; and

Whereas, the Higher Education Act of 1965 (Title 20, Chapter 28, Subchapter 7, Section 1144, United States code) states that "nothing contained in this chapter shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration or personnel of any educational institution . . ."; and be it therefore

Resolved, That the proposed *regulations* be amended to provide that there be no undue or unwarranted interference with or intrusion into the internal operations of any private institution by members of government consistent with the guarantee of the original act; and be it therefore

Resolved, That the proposed *regulations* be amended so as to permit interpretation consistent with the Christian and moral respect for the individual as taught in the Holy Bible, and as adhered to by the member institutions of this Association; and be it also

Resolved, That the proposed *regulations* be amended to recognize the inherent human needs and constitutional rights of every individual among which are the right of privacy, the right of safety from harm or being placed in fear of bodily injury; and be it further

Resolved, That the *regulations* be amended to allow for the orderly, proper and necessary protection of these and other God-given inalienable rights in the pursuit of happiness, and the enjoyment of the practice of religion, and peaceful existence.

It is resolved, On this the 26th day of the month of September, 1974, in session, by the representatives of the member institutions of the Association of Southern Baptist Colleges and Schools, with copies of this Resolution to be distributed to the Secretary of Health, Education, and Welfare in Washington and to other appropriate offices, and a copy of this Resolution to be spread upon the Official Records of this Association.

This the 26th day of September, 1974

ASSOCIATION OF SOUTHERN BAPTIST
COLLEGES AND SCHOOLS
By JAMES L. SELLS.
By G. KELLEY.

Attest:
BEN C. FISHER,
Executive Director-Treasurer,
Education Commission, S.B.C.

STATEMENT OF CARL G. CROYDER, POTOMAC, MD.

Chairman O'Hara and Ladies and Gentleman of the Sub-Committee: Mine is a different kind of testimony. It is the testimony of a citizen who filed an actual Title IX complaint in December, 1973 against a major university—the University of Maryland. You will be hearing much "lawyer talk" during the upcoming hearings and perhaps what is offered here will be a welcome change. What follows is not an attempt to "try" a particular case but to illustrate certain underlying attitudes which bear significantly on the important issues which you are considering:

(1) Mr. James H Kehoe, the Athletic Director at the University of Maryland, is one of the most outspoken opponents of Title IX. He has consistently refused to discuss my Title IX complaint with me or anyone else on a give-and-take basis (supposedly "on the advice of counsel"). I have been quite prepared up to this point to withdraw by complaint on the basis of certain assurances. However, mediation through the University's Office of Human Relations has been rejected.

(2) Mr. Kehoe inveighs against Title IX as unrealistic and as a dangerous threat to athletic programs everywhere. Mr. Kehoe, however, refuses to allow public scrutiny of his budget. In this, he is not very different from most Athletic Directors. Yet how can the testimony of such persons be taken seriously—especially those persons representing public, tax-supported institutions—when they refuse to allow a public audit of their books? To my knowledge, no one outside the University of Maryland knows Mr. Kehoe's budget in detail. Even within the University the budget is not generally available. The Chancellor's Commission on Women's Affairs, to take an example, was not able to obtain a copy of the complete athletic budget.

(3) Mr. Kehoe apppears to justify his immunity from public accountability and Title IX on the basis that his operation is self-supporting. Let's take a look at this:

(a) The total athletic budget at the University of Maryland is about $2,500,000. The women receive only $30,000—or a smidgin over 1%. (Lately it seems that Mr.

Kehoe has discovered some hidden costs and is now saying that the women's budget is $50,000.)

(b) A mandatory athletic fee of $30.00 a year is imposed on every undergraduate. This accounts for about $700,000 of the $2,500,000. This athletic fee does permit the students to attend all home games. However, twenty-four thousand students don't go to each game (Cole Field House doesn't even hold that number); so Mr. Kehoe does a brisk trade selling the same seats twice.

(c) The Terrapin Club contributes another $500,000 to the $2,500,000 total. To my knowledge, however, no Terrapin Club money is asked for or given to the women's program. The weekly promotional newsletter mailed to Club members from Mr. Kehoe's office says virtually nothing about the women's activities.

(d) The balance of $1,300,000 (or roughly 50%) is raised from ticket sales and TV rights, etc.

(e) As to expenses, Mr. Kehoe does not pay rent for Cole Field House and Byrd Stadium, provided through the University of Maryland.

The purpose of the above is to indicate that this particular athletic program is not "self-supporting" as claimed. Additionally, it is to indicate that women are not included in fund-raising goals. And still additionally, it is to indicate that at the University of Maryland at least, money is not only withheld from the women, it is actually taken away from them. The women students contribute $300,000 of the $700,000 total in athletic fees. And the women's program gets back ten cents on the dollar, or $30,000. Mr. Kehoe needs the women's student athletic fee to stay in business, but giving the women's athletic program a fair shake "will shut down the non-revenue sports."

(4) A front page feature article appeared in the Diamondback (the student newspaper) last spring. The key to Mr. Kehoe's basic attitude was made clear when the writer reported the Athletic Director as saying that since it was *men's* football and basketball which produced revenue, most of the surplus revenue should go to *men's* non-revenue sports.

(5) Many colleges and universities have moved to upgrade their women's programs—doubling, tripling, quadrupling the budgets year by year (up to $100,000—$200,000—$300,000). Maryland, unfortunately, is an example of an institution which has done very little—even with a Title IX complaint lodged against it.

(6) Lastly, there is a great cry of "Wolf-Wolf" on Mr. Kehoe's part and others of like voice. They claim the proponents of Title IX are out for equal funding (which *would* wreck the athletic programs) when everyone involved has steadfastly maintained that the women seek only equal opportunity—a fair shake consistent with the present level of interest. It is indeed interesting to note that only the hard-liners use the scare tactic. The Athletic Directors who are already upgrading their women's programs aren't crying "Wolf-Wolf."

Ladies and gentlemen of the Sub-Committee, the attitudes outlined above, while attributed to one man, are typical of a great many Athletic Directors, most of them consider that the National Collegiate Athletic Association with its bursting treasury, speaks for them.

Statement of National Association of Basketball Coaches

The National Association of Basketball Coaches (NABC) released through its Board of Directors, the nations basketball coaches position on the highly controversial Title 9 Regulations promulgated by HEW. The NABC is making a concerted effort through its 2,000 members to delay application of the Title 9 Regulations to intercollegiate athletics until HEW makes a serious study of the practical application of Title 9 on college programs.

The coaches after two days of briefings say that the Title 9 Regulations which HEW would impose on colleges and universities under the pretext of elimination sex-discrimination, will place inter-collegiate athletics under the *full* control of the Federal Government and will eventually destroy many intercollegiate programs. Further the regulations are not responsive to the financial and social realities of intercollegiate athletics.

"We're making a strong appeal to our Nation's basketball coaches to join us in our efforts to advance our position. We encourage the sporting public and basketball fans throughout the country who have enjoyed and supported our collegiate basketball programs, to be aware and join us in contacting our Congressmen to support our concern."

College basketball has enjoyed its greatest popularity ever this past season and along with football, have been the major revenue-producing activities which have benefited the many other sports in collegiate athletics—both male and female; and is now, through this impending legislation, in danger of collapse.

BILL FOSTER,
President, N.A.B.C., Duke University.

STATEMENT OF THE LEAGUE OF WOMEN VOTERS OF THE UNITED STATES

The League of Women Voters of the United States welcomes the opportunity to submit this statement in support of immediate implementation of the Title IX regulations to the Higher Education Amendments Act of 1972. Over the years, the League has concentrated on elementary and secondary education focusing specifically on ways to ensure that all Americans have equal access to educational opportunities regardless of race and economic position.

In recent years, we have turned our attention to another kind of discrimination that is widely sanctioned in both the private and public sectors to an intolerable degree; that is, sex discrimination. The League has found that equal access to educational opportunities has been one means to promote social and economic justice for all races. Likewise, we believe that equal access to educational opportunities is one way to foster social and economic justice for both sexes.

Three years have been lost in implementing the requirements of Title IX. Congressional intent has been thwarted by executive branch footdragging. Now that final regulations have been submitted, the League of Women Voters urges that this committee and Congress act constructively and not block implementation of its own 1972 Act.

> Schools are the primary vehicle in our society for socialization and career motivation. To the extent that public schools treat young women as second-class citizens, inferior to their male classmates and less worthy of expenditures of educational resources, women will continue to occupy the lower economic stratas of our society. Despite the widespread myth that young girls can look forward to a carefree married life supported by a male breadwinner, the facts are that the majority of women will work—and will work in economically disadvantaged jobs.[1]

Sex discrimination in publicly supported educational institutions has already reinforced cultural biases about women's roles in society. Women who might have come into their full intellectual majorities were never motivated to pursue such ends merely because of gender. Concomitantly, those women who have acquired the necessary educational credentials often find themselves denied access to academically suitable employment opportunities or to equal remuneration—again, merely because of sex. As this new generation of young women travels through elementary, secondary and postsecondary institutions, we must not allow them to suffer the same fate. The Title IX regulations, in our judgment, would provide the impetus for sorely-needed changes; delay in their implementation will result in a basic loss to individual women and to the nation.

We commend HEW for including the provision which treats pregnancy as a temporary disability. In effect, this provision reassures women that their unique child bearing ability will not be used punitively. Ironically, this uniquely female characteristic has been used as a rationale to impede women's progress and abort their potential in the economic and intellectual world.

We also support the provision requiring institutions to conduct self-evaluations and hope that they do not view this requirement as an attempt to establish blame.

Conversely, we hope it is seen as an opportunity to determine how policies and practices can be changed so that equal opportunity will, in fact, be enjoyed by women and men. It is conceivable that upon finding discriminatory practices, educational institutions will hasten to change them voluntarily.

One provision that causes us great concern, however, is the section on grievance procedures. Although institutions are required to set up procedures for the resolution of student and employee complaints, no deadlines or standards have been established that would ensure that complainants receive prompt and equitable treatment.

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[1] Comment of Susanne Martinez as it appeared in "Sex Discrimination," in Equality in Education, Number 18, October 1974, Center for Law and Education, Harvard University, p. 6.

We are disturbed by the disproportionate emphasis that the section on athletics has generated. In our judgement, the primary issue is that equal opportunity in athletics and all physical education programs will be provided to all students. We believe that Title IX regulations prohibiting sex discrimination *will expand* these opportunities.

These shortcomings can be adjusted in subsequent regulations under statutory guidance. On balance, the League is confident that Title IX regulations advance the concept of expanding realistic equal opportunity without regard to sex. To deny women equal access to all facets of the educational experience by failing to implement these regulations would be a severe setback to the gains that have been made in the areas of equal opportunity since the passage of the Civil Rights Act of 1964. Immediate Congressional implementation of the Title IX regulations will bring women of all ages closer to the actualization of equality.

STATEMENT OF DAVID ROSE, UNIVERSITY OF MASSACHUSETTS

Mr. Chairman, members of the subcommittee, my name is David Rose. I am a graduate student (PhD.) in sociology of sport at the University of Massachusetts in Amherst. I am submitting written testimony to the Subcommittee in order to clarify some of the contentions and issues revolving around the proposed implementation of Title IX with respect to intercollegiate athletics. My primary purpose is to depict a more accurate and precise picture of intercollegiate athletics than the blurred and distorted one presented (and implied) by Dr. Fuzak, representing the National Collegiate Athletic Association, in testimony before this Subcommittee.

Specifically, I intend to refute the NCAA claims that (1) Title IX *should not* be implemented because it will "spell disaster in this time of economic crunch to the entire intercollegiate athletic program at most colleges—and the opportunities for women student-athletes, no less than men, will be severely impaired in the process;" and that

(2) Title IX *need not* be implemented because women's athletic expansion can be accommodated within the prsent NCAA-dominated system.

According to Fuzak's statement, the NCAA's position on Title IX is as follows: ". . . the NCAA and its member institutions have been, and *are*, fully committed within the limits of all available resources, to provide the *best possible* intercollegiate athletic programs responsive to demonstrated interest of both male *and* female student-athletes." [p. 12] (Emphasis theirs) Hence, the NCAA is philosophically committed to equal sex opportunity in intercollegiate athletics. If the present status of women's intercollegiate programs is not equal to that of the men, the responsibility is not the NCAA's—since women have only recently shown "significant and reasonably sustained interest . . . in intercollegiate athletics. [p. 13] Having been made aware of this interest, the NCAA and its members have moved to respond voluntarily [p. 13] and have made significant accomplishments in meeting these demands. [pp. 12, 13] Unfortunately, the NCAA members are also presently in deep financial trouble [p. 10], and have not been able to act as rapidly as they would have liked. Lamenting that its members have no control over the source of their financial troubles, including inflation and the commercial threat of professional sports, the NCAA argues that Congress should reject Title IX, because implementing it would compound present financial difficulties and "spell (financial) disaster" for both men's and women's programs. [p. 14] The apparent method by which this disaster would occur is that Title IX, by taking money from the revenue-producing sports, would inhibit the ability of these sports to provide the vital funds by which the rest of the intercollegiate athletic program is financed. Therefore, should Congress accept Title IX, the NCAA proposes that the revenue-producing sports be exempted from the regulations, at least to the extent that the money which they generate be permitted to apply first to the particular sports by which it was generated. [p. 14]

My own description is as follows: The NCAA is first and foremost philosophically committed to producing capital-intensive, marketable athletic entertainment, an activity legitimated by the idea that the entertainment provides the funds for the educational experience of athletic competition in non-revenue-producing sports. (This legitimation shall be called "the doctrine of good works.") If the NCAA's interest in women's athletics is a relatively recent one, its behavior is stimulated both by its attempt to be responsive and by its attempt to further its own political ambition. Nevertheless, judging by NCAA-proffered examples, member institutions' efforts to support women's programs are more tokenism than "accomplishments." The NCAA lament over its lack of control of the sources of its present financial difficulties ignores the lack of control it had over the primary factors of its growth, an expanding student market and the dynamic which stimulates the conduct of Big Time football, the perception of college football as a deference challenge. Further, to contend that implementing Title IX would endanger future opportunities for both men and women by endangering the ability of the revenue producing sports to generate money is to flagrantly misrepresent the extent to which this model is not *now, and will not be*, applicable to NCAA member institutions. The NCAA's own evidence supports this contention. Finally, if Congress votes either to reject implementing Title IX with respect to intercollegiate athletics or to exempt revenue producing sports, it will have contributed to the restraint of the growth of women's athletics by approving a "business-as-usual" conduct of intercollegiate athletics by an organization which has become increasingly unable to respond to the interests of its members and the student-athletes which they serve.

It is commonly believed that intercollegiate athletics are financed in such a way that football generates enough revenue to support the rest of the intercollegiate athletic program sponsored by a college or university. Indeed, this doctrine of good works has been used historically since the 1920s to justify the association of athletics (as entertainment) with higher education. NCAA data, available in the *Financial Analysis of Intercollegiate Athletics* (hereafter known as *Financial Analysis*), a monograph published in 1970 by the NCAA, shows that during the '60s, for class A and Class B schools, those 275 schools with the highest quality football programs, approximately 50–60% of the average athletic budget was expended on football and basketball, the other revenue producing sport [pp. 47, 49]. The data also shows that for these same classes, football and basketball generated from 50–85% of all athletic revenue [pp. 14, 16].[1] Hence, there is often revenue left over which can be used to finance other sports or can be placed in a reserve fund for future use. Since the NCAA claims to be philosophically committed to equal sex opportunity, it indicates that the policy of its member institutions, in view of the demands of female student athletes, will be to use part of that excess to meet those demands. [Fuzak].

Ironically, because there is already an organization, the Association for Intercollegiate Athletics for Women, providing the services the NCAA intends to provide for women, it is immediately apparent that there is more to the NCAA action than their statement reveals. The ulterior reason for the NCAA's interest in conducting women's programs is that if it succeeds, it can claim to represent both male and female college student-athletes, a claim it must be able to support if it is to be the United States representative to the World University Games Council. The relevance of this behavior, particularly as it bears upon the clash between the NCAA and the AAU for control of U.S. amateur athletics, is so obvious that it deserves only passing recognition.

Given this new-found interest in women [NOTE: The *Financial Analysis* does not mention one word about womens athletic programs.], the appropriate question to ask is how are the institutions responding? Assuming that the figures presented by Fuzak are attributable to NCAA activity and no AIAW activity (since there is approximately 50% overlap in membership), the model NCAA intercollegiate athletic program, the University of Michigan, has responded dramatically (?) by allocating 14% of the non-revenue producing athletic budget to the 28% of the non-revenue producing sport athletes who are female. If this (and the other less useful figures) are representative, as they claim, the so-called accomplishments are rather meager. Of course, besides the relatively small time span in which the NCAA members have had in which to respond, there is also the problem of the financial difficulty of existing men's programs.

Stimulated by the financial squeeze on the Big Time during the 60s, the NCAA collected and analyzed data from a questionaire sent out to its member institutions. The *Financial Analysis*, which is the product of that effort, essentially concluded that inflation and the increasing quality of services were responsible for the rising costs of athletics, particularly in the Big Time. In view of the Fuzak testimony, one reason for the rising quality of services was the need to compete favorably with professional sport. I contend that the Financial Analysis misplaces the source of the present financial difficulty because it fails to take into account the environment in which athletics grew in the 60's and because it does not recognize the basic dynamic which stimulates the conduct of big time athletics.

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[1] The data in the *Financial Analysis* is somewhat inaccurate. For a corrected set of trend data, see David Rose, "UMass Athletic Expansion, 1957–1972: A Case Study of Middle Time Athletics" (unpublished paper).

Taking the latter first, a common belief is that college football is controlling less and less of the entertainment dollar because it must compete with increasingly proliferating varieties and numbers of entertainment forms, especially professional sports. In competing with professional sport as an entertainment product, college football must gain control of the arena of combat, the seat—in the stadium and in front of the TV set. Given the reputed success with which pro sport expanded during the 60's, it is appropriate to ask why college football did not emulate the business practices of the pros? That is, why did the NCAA not act as a corporate body similar to the NFL (at least, after merger), and control its growth in order to maximize its profits? In order to understand what this question is asking, I must refer to Neale's claim that professional sports' peculiar economics make each sport a natural monopoly in which the firm is not the franchise, like the Redskins, but rather the league, the NFL. The product produced by this firm is therefore not the single game event, but rather the race for the league championship. Given this background, the previous question then asks, did the NCAA engage in the following business practices:

1. expand into other seasons of the year? Eg: did they increase the number of games in a season?

2. expand the frequency and quality of its media (especially TV) coverage? Eg. did they schedule games so that a race was produced over the media?

3. expand into regions of the country which are ready to support Big Time intercollegiate athletics? Eg: did they investigate the financial viability of offering sports in 'weak' locales, like the Northeast, and then encourage and help finance some school in that region?

4. expand into other activities not traditionally associated with the NCAA? Eg: did they establish outside commercial ventures, like sales of sports equipment, sport films; sell insurance; construct non-athletic facilities; etc.?

While it is true that, for example, the length of the football season was increased and that member institutions did comply with television's efforts to arrange important interregional or conference championship games so that they occured as if for a championship, the NCAA did not act in as centrally planned a way as possible. There are two related reasons for this. On the one hand, to do so would be to openly admit the blatantly commercial nature of the enterprise, an admission which the moguls of the game have only recently begun to make, though not without some compunction. On the other hand, the strain toward such central planning is restricted by territorial (that is, political) barriers. More specifically, the centralized control is inhibited by the decentralized control structure represented by the states, who retain sovereignty over education and who endorse the NCAA's principle of "institutional control' of athletics.

Given this decentralization, it is now possible to examine two issues more closely: (a) are the colleges competing with the pros? (b) are the colleges merely minor leagues for the pros? If the colleges are competing with the pros but are at the same time minor leagues for the pros, then there must somehow be a separate product identity which the colleges have been able to sustain. That is, unlike other minor league operations (notably in baseball and boxing) which have been killed by market penetration (through television) of the majors, Big Time college football has been able to survive and even flourish (grow) financially. This is possible only if the product being offered by the colleges is perceived to be distinct from that of the professionals. The question is then, in what sense is the college game distinct from the pro game? The answer is that *college football* competition, more so than professional football, *is perceived as a deference challenge*. What this means is two-fold: the quality of the team is somehow representative of the quality of the school: so that victories on the field create a prestige hierarchy of institutions of higher education. The significance of this concept demands elaboration.

That such a belief of prestige hierarchy based on athletic outcomes exists perhaps needs little support. It is widely presumed applicable to international competition, as attested to by the significance of winning matches, like the 1972 Olympic basketball game, against the Soviet Union. That it also applies to organizations in academia, both for secondary and for higher education, is supported by the also-widely-accepted existence of the *traditional rivalry*. The prestige hierarchy implicit in the rivalry is most explicitly stated in the phrase, "braggin' rights," which are the spoils of victory (for both participant and spectator) in the Alabama/Auburn game. Without going into the historical background of any particular rivalry, it is sufficient for present purposes to note that there is a strong territorial (but also some ethnic and social class) foundation to most of the rivalries presently important in college football today.

That the professional version of the game lacks this concept of a prestige hierarchy associated with territory is easily seen by two points. First, the shifting and creation of professional franchises during the recent expansion of the 60s makes the attachment of a city (state, regional) label to a team much more artificial than it does in the case of a more territorially fixed (especially state) university. Second, and more important, the recruitment of personnel by means of a common draft from an undifferentiated pool, as is done in the pros, offers no equivalent to the social bond which develops because of the recruiting procedure of the colleges. The recruiting procedure of college football creates (takes advantage of) a social bond whereby the athlete choosing a particular school is believed to do so not merely because of the opportunity it offers him for future athletic purposes but because of the quality of education offered by the school (implicitly, education offered by a state, social class, religious or ethnic group) and because of all the nice people (especially alumni) whose own ethnocentrically high opinion of the school (and of themselves) his choice confirms. Rooney presents data which suggests, at least for the Big Time conferences be examined, an exceedingly high proportion of Big Time college athletes are recruited to play in the same region in which they were high school athletes. Further, most of the inter-regional athlete migration which occurs seems to be an overflow from high producer (high school level) areas to the Rockie Mountain States.

There is an additional important point to add to this. It is not necessary that a majority or even plurality of the people of a state or alumni of a school believe that the outcome of the game establishes a prestige hierarchy. After all, most people are either not in a position to take an active interest in these matters or do not socially interact with individuals from other regions from whom such a hierarchy has behavioral implications. However, for those persons who do regularly interact with elites from other areas and who are in a position to affect the policies of State U.—for example, a state or national politician or a businessman alumnus, "braggin' rights" can very definitely hinge on the outcome of athletic contests.

Summarily, then, I am suggesting that the difference between college and professional football as commercial products is that college football is seen as a deference challenge between schools, and implicitly between states. Within this argument I am also suggesting the financial success and expansion of Big Time college football was stimulated during the 60s not so because of competition with other entertainment forms, but because of its fundamental nature as a deference challenge.

If the deference challenge was the stimulus, student expansion was the means. The same means permitted the state universities outside the Northeast to displace the private schools of the East from their dominant positions in college football 45 years earlier. During the 60s, higher education was a major growth industry, riding the crest of recklessly expanding economy. The enrollment in higher education increased both absolutely and relatively, so that with each new year college athletics had bigger classes of incoming freshmen undergraduates and 'freshmen' alumni to draw upon to finance the deference challenge. It is important to note that women constituted an increasing proportion of that captive market. Now however, with both the economy and enrollment slowing down, the expanding captive market for college football has disappeared. Despite this gloomy situation, the NCAA maintains that its members will be able to continue the expansion of women's programs; and that they will be able to do this by continuing to rely on revenue producing sports. I will show otherwise.

According to data presented in the Financial Analysis, in 1969 (before things got worse), for 84% (550 of 655 members) of the NCAA, football fell into one of three categories: (a) not sponsored by the institution (210), (b) sponsored as part of the educational experience with no concern for its ability to generate revenue (170), (c) sponsored as a revenue producing sport but one which is a net money loser (170) [pp. 2, 47]. More can be learned by concentrating on Classe A and B, the two whose members sponsor the highest caliber football and who therefore should be expected to conform to the golden goose myth regarding football's importance as a revenue producer. What the data in fact suggest is that in 1969, for these classes, only 386 sponsored football programs which were not money makers [p. 47]. Using aggregate data, the trend over the 60s Class B was for football to decline in importance as a revenue producer [p. 14], with a concomitant increase in the relative importance of student assessments, presumably mandatory [p. 8].

It is even more interesting to note that in Class A, where in 1969, more than 75% of the schools showed a profit from football, the trend during the 60s of the "best possible intercollegiate athletic program reponsive to demonstrated interest of . . . male . . . student athletes" showed a decline in the ratio of male intercollegiate athletes to male students [p. 81]! Indeed, since the beginning of two platoon football, most of the increase in the number of intercollegiate athletes is attributable to the increase in the number of football players [p. 83]. Belt tightening in the Big Time since 1969 has reduced this ratio further. The greatest restraint has of course been accorded to football, where with undoubtedly great reluctance, the NCAA recently voted to reduce the maximum allowable number of scholarship-football-players-not-in-the-game by reducing the maximum allowable number of football scholarships from 120 to 108.

In other words, the contention that the "basis upon which most universities are able to operate their present intercollegiate athletic programs for men and women, that is, by the use of revenue producing sports to sustain all or a major part of intercollegiate athletic budgets" is blatantly misleading as a description of the financial structure of intercollegiate athletics. While it is phrased to imply that football produces revenue for the financing of other sports, it can be (and does fit the data more accurately if) interpreted to mean nothing more than: football, as a major part of the athletic budget, will produce the revenue to support itself. It is interesting to note that when asked to define "revenue production," Fuzak hedged by invoking the notion related above.

Finally, lest anyone still believe that the present financial difficulties are merely a phase in the economic development of intercollegiate athletics, I will conclude by arguing that the doctrine of good works will never again (if it ever did) apply to more than a small minority of intercollegiate athletic programs. In order to do this, I will divide the football schools of the NCAA into developed and developing sectors. While the entire model is not presently supported by empirical data, I believe it accounts better than any other, for the present dilemma of college athletics.

By the developed sector I mean those schools whose programs have more or less consistently produced the top caliber of football over the last 15 to 20 years. By the developing sector I mean those schools which during the 60s attempted to develop athletic programs on the model of the Big Time, both because the model was perceived to be financially viable but more importantly because the leaders of these schools accepted the idea of football as a deference challenge on which the prestige of the school was accorded. In order ot test football's capacity as a revenue producer, I want to examine this model in more detail, focusing on the perspective of the developing sector.

The developing sector are those schools, which I shall call the second level prestige schools in a state, which expanded from state or teachers colleges to full-fledged universities, complete with the traditionally large student populations. At the time of the great education boom of the 60s, these schools were led by men who had been educated and gone on to administrate at a first level prestige school and who accepted all the classical assumptions about the conduct of intercollegiate athletics, including the importance of football to the financial well-being of the athletic program and to the social well-being, both internal and external, of the school. However, because the football program at the second level school was not self-supporting, these leaders used student assessments and state tax appropriations to finance football's expansion—for what economists call the "take-off period," or until such time as football was able to support itself—anad hopefully the rest of the program. Empirical evidence, including that cited earlier, suggests that post-take-off has not yet happened and I contend will never happen. Why not? The answer is painfully obvious. The markets are saturated and becoming increasingly homogeneous.

In the past, the success which state schools had in displacing the Ivy elites and Eastern independents from dominating college football was facilitated not only because of the size differential of the public vis a vis the private school, but also because the programs at the state schools could develop (as a commercial enterprise) virtually unhindered. This advantage is not available to the second level schools of today. Through the wonder of television, the Big Time has penetrated nationally the collegiate football market, diminishing the attraction of the non-Big Time game in the same way the major leagues of baseball diminished the attraction of the minor league version of the game. That this is the case can be learned merely by looking for accounts of extreme cases: two developing sector teams—rescheduling a game in order to avoid competing with the developed sector game that is being aired on television the same afternoon. It is this market penetration which compels the developing sector to continue to rely on tax appropriations and student assessments to finance its intercollegiate program. It is also the probable reason for financial difficulties at those schools which are the equivalent of the Little 8 of the Big 10. Television is institutionalizing certain college games, thereby (perhaps) unwittingly creating pressure for an electronic national conference in football, rather than the present goographical regional ones.

Historical trends suggest that the dispersion and distribution of success in football is becoming increasingly concentrated. Rooney, for example, presents evidence which suggests that, compared with the period 1931–45, in the periods 1946–62 and 1963–71, the number of teams to make the top ten, and to make it more than once, declined [pp. 44–46]. Even more emphatic is the fact that over the period, 1967–1974, only seven teams appeared in 41% of all ABC national telecasts of college football. According to the Financial Analysis' aggregated average revenue data, although the absolute amounts of revenue generated by Class A and Class B football and basketball were increasing during the 60s, after the beginning of national football telecasts, the Big Time experienced its fastest rate of revenue growth while Class B revenue growth from these sports was slowing down.

In conclusion, perhaps intuitively the NCAA is aware of all this. Perhaps that is why they have gone for rejection of Title IX in hopes of getting an exemption for revenue producing sports as a conciliatory measure. Point by point, their contentions are either totally erroneous or flagrantly misleading. The ultimate charade was played when the NCAA proposed not that revenue producing sports be exempted from Title IX, but only that "the gross revenues from a revenue producing sport be permitted to apply, first, to covering the expenses of maintaining that sport." It is ironic that the Subcommittee chairman seemed so receptive to this proposal when it is merely a restatement of the method of operation of every Big Time athletic program for the last 55 years. All that is new is the NCAA's chauvinistically skeptical inclusion of the possibility of a female or combined revenue producing sport.

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STATEMENT OF JOHN NELSON WASHBURN, LL.B., PH. D., WASHINGTON, D.C.

Written views submitted, together with one page of Soviet Russian-language material comprising three items covering the 1969, 1972–1973 and 1975 stages in the athletic career in the USSR Armed Forces of star gymnast Olga Korbut.

Chairman O'Hara, as in the case of the views on S. 3500 submitted by me September 25, 1974 to the Special Subcommittee on Education chaired by you pursuant to your request dated August 9, 1974, I am presenting as graphically as I can Soviet Russian-language material in order to make my point. For the purpose of stating my position with optimum clarity and force, I respectfully request that my September 25, 1974 views on S. 3500 be incorporated as an appendix to these June 26, 1975 views.

As you well know, Section 901(a)(4) of TITLE IX excludes from applicability "an educational institution whose primary purpose is the training of individuals for the military services of the United States. . . ." This exclusionary policy is carried over and reflected in the applicable RULES AND REGULATIONS section of Part 86, where in Sec. 86.13 one reads: "This part does not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States. . . ."

I submit, Mr. Chairman, that whether couched in terms of United States military services or a United States military service, it is a mistake to exclude from TITLE IX applicability such educational institutions.

My principal reason for so stating, Mr. Chairman, is my deep concern with the very great disadvantages faced by female athletes, actual and prospective, talented enough to represent the United States of America in athletic competition, Olympic or otherwise.

You will note that I used the term "female athletes" instead of "women athletes." I did so in order to include girls, all the American Olga Korbuts.

Yes, Olga Valentinovna Korbut, born May 16, 1955 and winner of three gold medals and one silver medal at the 1972 Summer Olympic Games, was so petite that on the occasion of her winning in Moscow the Women's 1972 USSR Cup in Sport Gymnastics on July 2 she was likened to a "vorobushek" (little sparrow) on page 1 of the July 4 issue of the newspaper Sovetskii Sport. And what a tiny girl she was when at age fourteen in Kiev competing in the XIV USSR ARMED FORCES SPARTAKIAD she made the Krasnaya Zvezda July 5, 1969 sport page, as shown in the attached poor-quality reproduction from that newspaper.

Mr. Chairman, the real secret of Olga Korbut's great success has been her Soviet Army connection as an alumna of the Central Sport Club of the Army in Moscow. Should we in the USA grant access to service academies at the post secondary education level to qualified female athletes without discrimination, we could develop Olgas of our own.

STATEMENT OF AMERICAN LIFE INSURANCE ASSOCIATION AND HEALTH INSURANCE ASSOCIATION OF AMERICA

The American Life Insurance Association and the Health Insurance Association of America represent 516 life and health insurance companies accounting for about 90 percent of the total life insurance in force in the United States, 90 percent of the total health insurance written by insurance companies, and over 99 percent of the assets of insured pension plans.

This statement relates primarily to section 86.56(b)(2) of the regulation of the Department of Health, Education, and Welfare on Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance. That section provides that a recipient of federal assistance (as defined) shall not ". . . participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex. . . ."

We support this section of the regulation. We believe that it is not "inconsistent with the Act from which it derives its authority", and that in fact it represents the only proper interpretation of that Act. To simplify this presentation our comments will deal primarily with pension benefits, although the principles stated apply also to life and health insurance benefits.

I. SECTION 86.56(B)(2) IS NOT INCONSISTENT WITH THE ACT FROM WHICH IT DERIVES ITS AUTHORITY

Title IX of the Education Amendments of 1972 (20 USCA 1681 et seq.) provides that: "No person . . . shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."

The statute under which this Subcommittee is reviewing the regulation (20 USCA 1232(d)(1)) provides that the regulation shall become effective unless Congress shall find that it is "inconsistent with the Act from which it derives its authority".

Hence the sole question here is whether section 86.56(b)(2) is inconsistent with Title IX. Section 86.56(b)(2) is clearly designed to eliminate discrimination on the basis of sex in the case of fringe benefit plans. It does so by providing that there must be either equal periodic benefits or equal contributions to the plan. No one can or does deny that this is one method of preventing discrimination. In fact, it is the method which has been in effect since 1965 under guidelines prescribed by the Administrator of the Wage and Hour Division of the Department of Labor pursuant to the Equal Pay Act of 1963 (29 CFR 800.116(d)). It is also the method currently prescribed in the guidelines of the Office of Federal Contract Compliance issued pursuant to Executive Order 11246, as amended (41 CFR 60–20.3). And until 1972 it was the method followed by the Equal Employment Opportunity Commission (29 CFR 1604.7(a) and (b) (1971)).

Those who question section 86.56(b)(2) argue only that this is not the best way. Some of them would prefer a regulation which would require equal periodic benefits only and preclude justification of unequal periodic benefits on the basis of differences in cost for men and women, as the current guidelines of the Equal Employment Opportunity Commission do (29 CFR 1604.9(f) (1972)). Others would prefer a regulation mandating the use of a unisex mortality table, a position which no federal agency has thus far adopted.

HEW received comments on all three of these possible approaches. HEW also recognized that there is presently a difference of opinion on this issue among the government agencies having responsibility for administering the several federal prohibitions against discrimination on the basis of sex.

After considering all three possible approaches, HEW concluded that the one adopted in its regulation is "the most reasonable at present". Further, as pointed out in the analysis of the regulation, "the President has directed that a report be prepared by October 15 recommending a single approach" by the several federal government agencies involved (Fed. Reg., June 4, 1975, p. 24135 . In view of all this, it is clear beyond doubt that the regulation in question is not "inconsistent with the Act." The opinions expressed by some that they would prefer another approach, or approaches, have nothing to do with the issue of consistency with an Act.

II. SECTION 86.56(b)(2) IN FACT REPRESENTS THE ONLY PROPER INTERPRETATION OF THE UNDERLYING ACT

While we believe that the above discussion disposes of this matter insofar as concerns review by this Subcommittee, we also feel strongly that the approach adopted in the HEW regulation is the only appropriate one. In our opinion, to require equal periodic benefits only or to require the use of a unisex mortality table would go far beyond what is necessary to eliminate discrimination on the basis of sex and would create very serious problems for employers, employees and insurers. We believe these conclusions result from consideration of existing forms of pension plans, of the desirability of permitting such plans to continue to use the varied approaches employers and employees have found suitable for their special situations, of the fact that women do live longer as a class than men, and of the inequitable treatment that would result from adopting either of the other two approaches considered and rejected by HEW. The question of equity between men and women in pricing annuities and life insurance must be measured on a group, not on an individual, basis and the HEW regulation permits continued equitable treatment of all pensioners while the alternatives would not.

A. There Is a Need for Flexibility in Pension Plans

Retirement benefit plans currently follow one of three forms. One is the fixed benefit form, with monthly benefits determined by reference to salary and length of service. The second form is the money purchase form, and the third is the profit-sharing form. Under both of the latter forms, an amount to be contributed each year is determined in accordance with plan provisions. These contributions are then accumulated and used at retirement to purchase whatever monthly benefit they will buy.

Thus, in the case of the fixed benefit form, the basic monthly benefits are always equal for employees with the same wage and work histories regardless of sex, but different contributions by sex are required because it costs more to provide annuities of a given amount to women than to men (as demonstrated in detail later herein). Both money purchase and profit-sharing plans accumulate equal contributions for equal salaries, but the monthly benefits for women will be smaller because of mortality differences between the sexes. Although the monthly benefits differ in such fixed contribution plans, the total lifetime benefits are of equal value to both sexes, since women on the average will receive benefits for a longer period than men.

Section 86.56(b)(2) would permit employers to comply with the law by providing either equal contributions or equal periodic benefits to men and women. If both alternatives were not permitted, it could be said that providing equal periodic benefits discriminates against men because larger contributions are required for women. However, permitting plans to continue to provide equal periodic benefits, even though the cost of such benefits varies by sex, is clearly in the public interest and should be allowed to continue. At the same time, some persons have claimed that fixed contribution plans discriminate against women because, in view of their longer life expectancy, the periodic benefits they will receive for the same amount of money will necessarily be smaller. Here again, however, such plans are in the public interest and should be allowed to continue.

The advocates of requiring equal periodic benefits only or of requiring the use of unisex mortality tables say that fixed (and equal) contribution plans are discriminatory solely because they do not provide equal periodic benefits. But such an argument overlooks the true facts. If women covered by such fixed contribution plans were to take out their money in a lump sum upon retirement, they would receive precisely the same amount of money as men with the same wage history. Also, the aggregate value of benefits to women will be the same as those for men, since women on the average will receive their monthly payments for a longer period of time. It is only the periodic, or monthly, benefit that will differ.

Looked at another way, to provide the same monthly benefits it would be necessary for the employer to make larger contributions for women than for men. If this were done, and lump sum distributions were taken upon the date of retirement, the women would receive larger lump sums than the men. Also, if the benefits were taken in the form of annuities, the value of the aggregate benefits paid to the women would exceed those paid to the men.

It has also been argued that women should receive the same periodic benefits as men because it costs them the same amount to live upon retirement. That statement does not go to the point at issue. The question is whether plans which provide equal contributions, but do not provide equal periodic benefits because of the longer life expectancy of women, constitute discrimination on the basis of sex within the meaning of the statute. The statute does not say women should receive the same periodic benefits as men. It says there shall be no discrimination, and there is no discrimination if either the contribuitons to the plan or the periodic benefits under the plan are equal.

B. *It Is Indisputable That Women Have a Longer Life Expectancy Than Men*

The U.S. Census Bureau collects statistics for the entire population which show appreciably lower mortality rates for women than for men at all ages.[1] This is not unique to the United States. The United Nations reports lower mortality rates for women than men throughout the world.[2]

The Society of Actuaries periodically publishes studies of intercompany mortality results under life insurance contracts. Their most recent reports (1972) cover policies amounting to $187 billion of insurance coverage and claims paid of $1.4 billion. Female mortality rates for lives in this sample were appreciably lower than male mortality rates at all ages.[3] Similar results were also seen in all earlier studies.

In the field of annuities, the most recent mortality table for individual annuities was published in 1971 based on experience for the period 1960 through 1967. The experience covers both people who are working inside and people who are working outside the home. The table shows overall female mortality to be about 75 percent of male mortality.[4]

The most recent group annuity mortality table was also published in 1971. This data shows even greater differentials between male and female mortality.[5] Earlier data compiled for a table published in 1951 showed similar differentials.[6] Interim studies made by the Society of Actuaries since 1951 show that the differences in male and female mortality actually experienced by insured groups were greater than had been predicted by the published group annuity table.

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[1] "Life Tables", *Vital Statistics of the United States, 1971*, Vol. 2, Section 5, U.S. Department of Health, Education, and Welfare, pp. 7–14.

[2] *Demographic Yearbook 1970*, United Nations, 1971, Table 20, pp. 710–729.

[3] "Mortality Under Standard Ordinary Insurance Issues Between 1969 and 1970 Anniversaries", *Transactions, Society of Actuaries, 1971 Reports Number*, pp. 18–22.

[4] Cherry, Harold, "The 1971 Individual Annuity Mortality Table", Transactions, Society of Actuaries, Vol. XXIII, Part 1, pp. 475–546.

[5] Greenlee, Harold R., Jr., and Keh, Alfonso D., "The 1971 Group Annuity Mortality Table", *Transactions, Society of Actuaries*, Vol. XXIII, Part 1, pp. 369–604.

[6] Peterson, Ray M., "Group Annuity Mortality", *Transactions, Society of Actuaries*, Vol. IV, pp. 246–307.

The Social Administration collects mortality data on workers, retired workers and other Social Security beneficiaries. These show higher differences in mortality between men and women than do the census statistics for the general population.[7]

Even though the observed differences in mortality have continued for many years including the past twenty years—a period during which women's roles in the working force have drastically changed—it has been argued by some that these differences are explainable solely in terms of socioeconomic differences. However, perinatal mortality rates (i.e., stillbirths occurring beyond the 20th week after conception and deaths in the first week of infancy) are over twenty percent higher for males than females.[8] It is clear that such differences cannot be explained by other than biological differences.

Further evidence that the differences in mortality between the sexes are widening while the differences in their roles in society are narrowing is provided by the *Metropolitan Life Statistical Bulletin* for December 1971. This Bulletin shows that since 1920 the ratio of male to female mortality has increased by more than 60 percent.[9] It also shows differences in mortality between the sexes for various causes of death. These statistics are further support that biological causes rather than environmental causes produce the differences in mortality between the sexes.

D. Mandating Equal Periodic Benefits Regardless of Cost Would Require Extensive and Unreasonable Changes in Existing Plans

If the HEW regulation were instead to require equal periodic benefits regardless of cost, a great deal of flexibility in designing pension and profit-sharing plans would be eliminated, and changes would be required in practically all such existing plans.

For example, plans which provide for equal contributions but unequal periodic benefits—such as money purchase and profit-sharing plans—could no longer be written. In this connection, it is important to note that, while a large majority of employees are presently covered under fixed benefit plans, more than one-half of the total number of plans in existence are of the fixed contribution type. Thus it is the smaller employers which would be affected most seriously by the equal periodic benefits only approach.

Large employers find it easier to use a fixed benefits approach because their earnings tend to be relatively stable over the years and experience under a group annuity contract covering hundreds of employees tends to generate predictable costs. In the case of a small employer, however, there is reluctance to promise fixed benefits many years in the future because the ultimate cost of such benefits and the employer's ability to pay that cost are subject to wide fluctuations. For this reason, smaller employers prefer a fixed contributions approach. The profit-sharing plan carries this approach one step further by providing that the percentage of salary to be contributed for pension benefits will vary depending upon the profits of the employer's enterprise.

For an employer to move from a fixed contributions approach to a fixed equal periodic benefits approach would require one of two basic changes—either the making of higher contributions for women than for men or the use of a unisex mortality table. (We shall discuss later the problem resulting from a unisex table.) Obviously, in the case of existing plans, the necessary consequence of making larger contributions for women than for men would be to increase the expense for the employer. The employer could hardly expect to be able to reduce the benefits for men. Hence, the only practical answer would be to increase the periodic benefits for women. It is estimated that in the usual case the increased cost to the employer would be about 15 percent.

We believe that the financial hazards of providing fixed equal periodic benefits as contrasted with the certain current costs of making fixed equal contributions would cause many smaller employers to discontinue their pension plan and discourage the establishment of new plans. Moreover, many educational institutions would find it impossible to continue their current system of providing pension benefits to their employees. Congress has just enacted a law to increase the retirement security of American workers and the continued growth of the private pension system promises to materially enhance the financial security of workers retiring in future years. If equal periodic benefits were mandated, it could result in diminishing the private pension coverage for thousands of employees of educational institutions and of smaller employers.

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[7] Bayo, Francisco, "Mortality of the Aged", *Transactions, Society of Actuaries*, Vol. XXIV, Part 1, pp. 1–24.

[8] "Reduction in Perinatal Mortality", *Metropolitan Life Statistical Bulletin*, Vol. 43 (May 1962), pp. 6–8.

[9] "Sex Differentials in Mortality Widening", *Metropolitan Life Statistical Bulletin*, Vol. 52 (December 1971), pp. 3–6.

To this point, we have discussed only the effects which mandating the equal periodic benefits approach would have on fixed contribution plans. There would also be serious results for fixed benefit plans. It is common in these plans to provide different benefit options to employees. The benefit amounts under these options must be determined on an equitable basis. These optional benefit purchase rates will differ for men and women, because of the differences in mortality rates. Thus, in these plans the alternative benefit options would either have to be eliminated or the trustee or insurer would have to use a unisex table. The losses in flexibility that would result from mandating equal periodic benefits regardless of cost are of key importance to employers and employees alike.

E. Mandating the Use of a Unisex Table Would Have Even More Serious Results

Since mortality tables are used to develop premium rates for both life insurance and pension contracts, the use of a unisex table would affect premiums for both types of coverage. Using sex-related mortality tables, pension plan premiums are higher for women than for men. However, life insurance premiums are higher for men than for women. Current pricing practices reflect the actual costs of providing such benefits. A unisex table would make the premium rates for the sexes equal. Thus, the adoption of unisex tables would result in having men subsidize the pension costs for women and in having women subsidize life insurance costs for men. These results would be inequitable and destructive to the insurance business, which is founded on proper classification of risk and charging premiums appropriate to the risk represented.

Requiring the use of unisex tables to determine the premium rates for money purchase plans and profit-sharing plans, and the charges for optional benefits under both fixed benefit and fixed contribution plans, would leave employers and insurance companies with several undesirable alternatives. One would be to use a table with mortality rates equal to current female rates. This would result in substantially reduced annuity payments for men (a reduction of 15 percent for men age 65 electing an annuity payable for life), if any men were to elect to receive an annuity rather than a lump sum distribution under these circumstances. A second alternative would be to use a table with mortality rates equal to current male rates. This would result in substantially increased annuity payments for women who elect to receive annuities rather than lump sum distributions. There would be a corresponding rise in costs for either the employer or the insurance company. A third alternative would be to construct a mortality table with rates somewhere between current male and female rates. The net cost impact would depend on the male-female content of the group and on the options actually elected by the members of the group.

A second effect of adopting a unisex table would be to cause adverse selection against insurance companies. Employers establishing pension plans essentially have two major options, either to purchase insurance or to establish a trust from which benefits are paid directly. Currently both ways would reflect the male-female content of the group, and pure mortality costs for the employer would essentially be the same under either approach. If a unisex table were to be required for use by insurance companies, large groups with a high percentage of men would undoubtdly take the trusteed route since their costs would be based on their actual mortality experience and be lower than the charges an insurance using a unisex table would have to make. However, large groups with a high percentage of women would purchase pension benefits from an insurance company using a unisex table, since the charges made by the insurance company would be less than the group would experience by paying benefits through a trust. This type of adverse selection would ultimately cause pension costs for persons buying pension benefits from insurance companies to spiral upward, thus causing additional adverse selection.

This also would lead to much higher costs for small groups. Large groups have a sufficient number of employees to make the trusteed approach possible. Small groups require the pooling of investment and mortality experience with others and therefore must purchase insurance. The insurance costs of these small groups would be increased because of the adverse selection by large groups with a high proportion of women, resulting in a subsidy of some large groups by small groups.

The third effect, which we have already pointed out, is that, while a unisex table may appear to equalize the costs of providing pension benefits to men and women, the actual costs of such benefits depend on the actual mortality experience. Since the mortality rates for men and women actually are different, one group is getting more compensation than the other since it would be getting more valuable fringe benefits.

In summary, mandating the use of a unisex table would result in inequity between the sexes in premium rates and benefit options, inequity between large and small groups, and inequity between the sexes in compensation.

F. In the Case of Pensions It Is Unsound to Argue that Discrimination Must Be Measured on the Basis of the Individual

As we have pointed out, it is indisputable that women as a group live longer than men and therefore equal periodic pension benefits for women cost more. Consequently, a regulation which requires either equal contributions or equal benefits is not discriminatory. Some persons have sought to counter this argument by asserting that discrimination must be measured on an individual basis, not a group basis; and, since some women will die earlier than others, or even earlier than some men, those particular women will be discriminated against.

This attempted measurement of discrimination is completely at odds with the operation of and the reasons for insurance, which is by nature a group mechanism. "Obviously, an insurance company has no way of determining when any particular one of its policyholders will die. Yet, if the company is insuring a large enough number of policyholders, it can predict with a high degree of accuracy the mortality experience for the group as a whole. Who will die in a given year is a matter of complete uncertainty; how many will die is a matter of near certainty." [10] This has equal application to pensions. While it is impossible to know which retiree will receive more—or less—than his or her share of the benefits, it can be predicted what his or her probable share will be and purchase rates for annuities must be based on such averages.

The function of insurance is to pool the equities of those individuals who share equal risks. In the insurance context, equity has meaning only for groups. Within each group, some individuals will receive more than others and some will receive less than others, but all will have the risk they insured against equitably covered, whether the risk is of living too long or not long enough. This is true for men the same as it is for women.

In some contexts, it may be appropriate to say that the individual should not be discriminated against on the basis of stereotypes. That is to say, the test is competence to do the job, not sex, and it should no longer be assumed that women are less competent because of their sex. This theory is capable of application in cases where individual competence can be determined. But it cannot be applied in insurance. No individual woman can say that she is being discriminated against because the same contributions will purchase smaller periodic benefits, since she does not know at age 65 or any other age how long she will live. No individual woman can say that she will not live out her life expectancy, since she does not know when she will die. If the individual knew when she or he would die, insurance would serve no purpose. Therefore, premium rates for pension plans must be based on averages, and the averages demonstrate beyond doubt that women live longer than men.

III. COMMENTS ON SUBSECTION (C) OF SECTION 86.57

The life and health insurance companies also have an interest in subsection (c) of section 86.57 of the regulation. This subsection provides that a recipient shall treat pregnancy the same as any other temporary disability for the purpose of payment of disability income and other fringe benefits.

We do not agree with this interpretation of the statute involved. That is, we do not agree that exclusion of normal pregnancy in health benefit plans, insured or non-insured, constitutes discrimination on the basis of sex.

However, this issue is now before the Supreme Court of the United States. On May 27, 1975, that Court granted certiorari in *Liberty Mutual Insurance Company* v. *Wetzel, et al.*, No. 74-1245, involving the sole issue of whether exclusion of pregnancy from an employer-employee disability income protection plan constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The decision of the Supreme Court in that case, which should be announced sometime late in 1975 or early in 1976, should settle this issue for the purpose of the several federal statutes on the subject of discrimination on the basis of sex.

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[10] Sternhell, Charles M. and Shur, Walter, "Probability, Mortality and Money Concepts", *Life and Health Insurance Handbook*, 3rd ed., Homewood, Illinois: Richard D. Irwin, Inc., 1973, pp. 128–129.

We appreciate this opportunity to comment, and we respectfully request that this statement be included in the printed record of the hearings. We would welcome the opportunity to discuss this matter further with any member of the Subcommittee or its staff, if that should be desired.

The undersigned head football coaches, in a specific meeting June 17, 1975 approved the following statement of policy regarding the announced HEW regulations implementing Title IX and will recommend that the Board of Trustees of the American Football Coaches Association at its meeting June 21, 1975 in Lubbock, Texas, officially urge all AFCA members to support this position.

1. The regulations go far beyond the intent of Congress and place intercollegiate athletics under the control of the Federal Government. The regulations will control the use of donated funds, use of generated income, the kind of program to be conducted and the allocation and qualifications for scholarship assistance. This is not desirable for the future growth of either men's or women's athletics.

2. Income generated by football is a principal source of athletic income at many colleges and frequently finances the entire athletic program as well as the construction, maintenance and debt retirement of facilities. In many instances it has provided the funds for the present expansion of women's athletics. This will no longer be possible under the HEW regulations.

3. College football, developed over more than 100 years, has been more responsible than any other factor for the present wide public acceptance and support of college athletics and there has been no valid study undertaken by HEW, the Congress or any other governmental agency as to the destructive economic impact these regulations will have upon football as well as the financial structure of intercollegiate athletics for both men and women.

4. The Federal Government does *not* provide any financial assistance, insofar as we know, to intercollegiate athletics, but these Federal regulations mandate vast new expenditures while seriously damaging for the future ability of men's sports to generate income. Therefore, we urge that Congress suspend these regulations and adopt legislation which would declare a moratorium on the application of HEW's rules to intercollegiate athletics during which HEW would be directed to study and report to Congress regarding (a) the need for such rules in light of the voluntary action being taken by colleges and (b) the economic impact of the rules on all facets of intercollegiate athletics and, in turn, the financial structure of the respective colleges and universities.

JOHN GREGORY,
South Dakota State University,
Chairman, AFCA South Dakota College Coaches.
GARY BONER,
South Dakota School of Mines and Technology.
TOM LONG,
University of South Dakota/Springfield.
BERNARD COOPER,
University of South Dakota, Vermillion.
DR. JAMES KRETCHMAN,
Northern State College.
DR. JOEL SWISHER,
Dakota State College.
GENE SCHLEKEWAY,
Black Hills State College.
BILL BOBZIN,
Yankton College.
GARY V. HOFFMAN,
Sioux Falls College.
GLENN JOGADZINSKE,
Huron College.
RALPH STARENKO,
Augustana College.
RONALD PARKS,
Dakota Wesleyan University.

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES,
Washington, D.C., June 27, 1975.

Congressman JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, U.S. House of Representatives, Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: The American Federation of State, County and Municipal Employees (AFL-CIO) welcomes the opportunity to submit written comments to the Subcommittee on the Federal Regulations implementing Title IX of the 1972 Education Act Amendments. AFSCME has over 700,000 members—40% of whom are women and many of whom work within the educational system. AFSCME is pleased to see that the spirit and purpose of Title IX will finally be backed by regulations. Their implementation is a critical step forward in the task of eliminating sex discrimination.

AFSCME has been vitally concerned with the problems that Title IX is designed to correct. For that reason, we supported and welcomed the passage of Title IX in 1972. In commenting last fall on the proposed regulations, AFSCME called for their strengthening, pointing out several areas for improvement.

Now that the final regulations are before this committee, we urge their approval. As we recommend in our prior comments, the final regulations have been modified to extend the following protections against sex discrimination:

1. Self-evaluation by a recipient of policies and practices regarding employment of academic and non-academic personnel;
2. Guarantee of pregnancy leave; and
3. Replacement of the original enforcement procedures with interim procedures now applicable to Title VI of the Civil Rights Act of 1964. (We view this modification as an indication that final enforcement procedures will be even stronger.)

While AFSCME wholeheartedly supports the speedy approval of these regulations, we wish to cite several important items we feel are missing.

The regulations do not ensure equal benefits in retirement plans for employees. They also fail to provide for inservice training programs for school personnel. Finally, while the self-evaluation provision is an important move in the right direction, AFSCME views mandatory affirmative action programs as a key method by which to undo patterns of previous discrimination.

Nearly three years have passed since the enactment of Title IX. We ask the Committee to approve these regulations without further delay and to urge HEW to devote its attention to their vigorous enforcement.

Sincerely,

JERRY WURF,
International President.

AMERICAN COUNCIL ON EDUCATION,
Washington, D.C., June 38, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The American Council on Education recommends that the Subcommittee take no action to prevent the regulations for Title IX of the Higher Education Amendments of 1972 from taking effect on July 21, 1975.

Discrimination by sex in institutions of higher education is morally indefensible and wasteful of the talents of those denied full access to all educational programs. Many institutions have already assessed their policies and practices and placed in motion corrective measures to assure equality of opportunity to women and men. Those who have not done so need the stimulus of the Title IX regulations to begin the assessment process. Further delay in promulgating the regulations would be neither just or reasonable.

The regulations as signed by the President seem to represent a reasonable interpretation of the statute that both educational institutions and women should have the opportunity to test in practice immediately. The Council plans to make every effort in assisting institutions in the implementation of this process.

Sincerely yours,

ROGER W. HEYNS.

AMERICAN COUNCIL ON EDUCATION,
Washington, D.C., October 15, 1974.

MR. PETER HOLMES,
Director, Office for Civil Rights, Department of Health, Education and Welfare, Washington, D.C.

DEAR MR. HOLMES: On behalf of the American Council on Education's Equal Employment Opportunity Task Force, I am pleased to have the opportunity to respond to the proposed regulations for Title IX of the Higher Education Amendments of 1972. The response of the Task Force by this letter and the attached analysis and recommendations in most instances mirrors the major concerns of colleges and universities. In addition we know that you will be receiving individual comments from institutions relating the proposed regulations to the prevailing situation on their own campuses. From the nature of their responses, you will note that there is a distinct diversity among institutions of higher education which must be recognized and dealt with if regulations of this nature are to be enforced fairly and in the spirit of their enactment. Reasonable latitude should be given institutions to carry out diverse educational processes in a variety of settings and to meet the demands of both parents and students. Diversity, one of the strengths of higher education in this country, should be fostered by federal legislation as being in the national interest. Title IX regulations should not be utilized as a means of effectuating the homogenization of higher education, but as a mechanism for establishing equality of treatment between the sexes within the prevailing heterogenous community.

As we have noted in many communications with various federal agencies, colleges and universities in this country are much concerned with the impact of dealing with a multitude of federal agencies with concurrent jurisdiction over charges of employment discrimination. Although the student portion of the proposed Title IX regulations is new and provides, in many instances, needed provisions to ensure equality of treatment between the sexes, the employment portion of the proposed regulations creates still another arena in which institutions must again comply with a set of regulations often conflicting in direction and interpretation. We are hopeful that this will not be another in which duplicative legislation multiplies paperwork and again diverts institutional energy and resources from the direct fulfillment of the spirit and the letter of the legislation.

The availability of facilities and resources in meeting Title IX will differ greatly from school to school. It is, therefore, suggested that it will be to the advantage of all parties concerned to allow institutions where necessary to file with the Director of the Office for Civil Rights a transitional plan of from one to three years detailing the mandated changes that will be accomplished in that time.

As noted in many instances in the attached commentary, it is essential that the regulations be written with sufficient specificity for institutions to understand their rights and responsibilities under this statute for federal officers to be given detailed standards for enforcement.

It is hoped that in carrying out investigations pursuant to their authority under Title IX, administrators in the field will accord institutions due process of the law, including the presumption that an institution is indeed to be considered innocent until facts are adduced to prove otherwise. Our experience in the past indicates many instances in which over zealous enforcement has led to backlash, unnecessary hostility and anxiety rather than the smooth and creative enforcement of federal legislation in the public interest.

Among all the issues that we addressed, one of the most fundamental to our concerns is the issue of the treatment of endowed single-sex scholarships. Unless institutions are permitted to pool their scholarship funds or otherwise preserve single-sex scholarships, they will have to resort to the judicial process in order to amend the multitude of trusts in their possession. This will require appearances in various jurisdictions, incurring attorneys' fees, court costs and dissipation of energy and time accompanied by the possible loss of such funds to residuary takers under such trusts. The process will inevitably reduce scholarship money for students, both male and female. It is instead proposed that institutions be permitted to pool their scholarship resources by matching single-sex dollars generated by endowed trusts with general institutional revenues, thereby creating equality of treatment for both sexes, and administering the remainder of the pool in a nondiscriminatory manner that would ultimately be to the interest of all parties.

With regard to institutions of higher education, we wholeheartedly applaud your position with regard to sex bias in curriculum materials. There is no question that the sex stereotypes of text and reference books is a serious problem. However, forcing institutions to establish standards and procedures for reviewing textbooks in order to ascertain whether they contain sex bias material is a book-burning process reminiscent of uglier days in our history when books were banned for other less desirable reasons. Freedom of expression must be fostered by institutions of higher education if they are to accomplish the goals of educating men and women for functioning in a democratic society. Censorship is not the answer where individuals who have reached maturity can judge written materials and formulate their own ideas from those available in the market place. Surely the tenor of our times is such that the reasonable societal pressures can control offensive material through normal processes without threatening academic freedom. In addition, we hope that the Secretary will follow through on his statement that HEW, through the Office of Education, will provide research, assistance, and guidance to local educational agencies in eliminating sex bias from curricula and educational material.

If pursuant to our comments and those of other associations and institutions substantial changes are made in the current draft of the regulation, we would like to suggest that the proposed regulations be reissued with a 30-day comment period so that these material changes can be analyzed further before the final regulations are promulgated.

We appreciate the time given us to respond, and we hope that material attached hereto will be used to improve the ability of institutions to carry out the spirit of Title IX. If you have questions with regard to any of the comments raised, our Task Force will be happy to meet with you to discuss them.

Very truly yours,

SHELDON ELLIOTT STEINBACH,
Staff Counsel.

Attachment

RESPONSE OF THE AMERICAN COUNCIL ON EDUCATION'S EQUAL EMPLOYMENT OPPORTUNITY TASK FORCE

86.2 DEFINITIONS

86.2(h) Recipient is defined *inter alia* as an entity which "receives or benefits from" federal financial assistance. The statutory language of Title IX of the Education Amendments of 1972 solely relates to the receipt of federal funds, although the persons protected under Title IX are protected from being, on the basis of sex, denied the benefits of educational programs or activities covered by the Act. The addition of the phrase "or benefits from" in the definition of recipient is an unwarranted extension of Congressional intent.

Recommendation: Delete the phrase "or benefits from" from the definition.

86.2(o) Administratively Separate Units.—The meaning of "administratively separate units" for admission purposes is unclear. If the term is defined to mean individual departments an enormous reporting requirement will be imposed upon universities, which frequently consist of substantially more than 100 separate departments, that would be compelled to file reports with HEW.

Recommendation: The section should state clearly that no unit smaller than a college, school or division which has degree granting authority is contemplated by the regulation.

86.3 REMEDIAL AND AFFIRMATIVE ACTION

86.3(a) Remedial Action.—It is unclear when a recipient is required to take remedial action. By whom is the determination made that a recipient has "previously discriminated"?

Recommendation: Remedial action to overcome the effects of previous discrimination on the basis of sex in an educational program or activity which receives federal financial assistance may be required if there has been a formal finding by HEW of discrimination in accordance with sections 86.64–86.66 hereof.

86.3 (b) Affirmative Action.—The concept of affirmative action is seemingly required solely in the athletic sphere (86.38) and in no other area. It is uncertain whether this section 86.3(b) compels affirmative action in every area impacted by these regulations and, if so, whether a formal finding of prior discrimination must be made first.

Recommendation: This section, which provides that an institution may take affirmative action to overcome the effects of conditions which resulted in limited participation by persons of a particular sex, should be noted as being a general discriptor, but that it does not necessarily apply in conjunction with every provision of the proposed regulations.

86.4 ASSURANCES REQUIRED

86.4(c) Form.—It would be helpful if the nature of the assurance could be specified in more detail, and if a presumption of compliance could be established that would continue until a recipient had been found to be in noncompliance by the Director. It is not clear from the language of 86.4 whether the Director, or any granting agency, may go behind the formal assurance of compliance and challenge compliance prior to acting on a grant application.

Recommendation: A recipient, executing a formal assurance of compliance, is for all purposes assumed to be in compliance absent a contrary showing by the Director.

86.6 EFFECT OF OTHER REQUIREMENTS

86.6(a) Effect of Other Federal Provisions.—This section presently provides that the regulations are independent of other federal obligations not to discriminate on the basis of sex.

Recommendation: In areas of overlapping jurisdiction there should be an agreement among the respective federal agencies as to which agency will take action in each area.

86.9 DISSEMINATION OF POLICY

86.9(a)(1) Notification of Policy.— This section provides that each recipient shall advise prospective employees and students that the campus is required by Title IX not to discriminate on the basis of sex.

Recommendation: The required advisory statement should not imply that it is only on account of Title IX that the campus does not discriminate on the basis of sex. That portion of 86.9(a)(1) whcih prescribes the content of the policy statement should be deleted.

86.9(b)(1) Publications.—This section provides that each recipient shall prominently include a statement of its policy against discriminating on the basis of sex in "each announcement, bulletin, catalog, or application form which it makes available to any person . . . .". The sweeping language of this provision imposes an impossible burden on the campus.

Recommendation: A full statement of the campus' policy not to discriminate on the basis of sex should be included only in major documents, such as faculty and student handbooks and official application forms for employment and admission; a brief statement to that effect would be sufficient in advertisements and other short announcements and bulletins, similar in nature to those comments presently used to designate "equal opportunity and affirmative action employers"; and campuses should not be obligated to republish existing catalogs or handbooks and should be given a reasonable amount of time to adapt such documents to the Title IX regulations.

86.9(b)(2).—This section provides that a recipient shall not use or distribute a publication which suggests that it treats students or employees differently on the basis of sex.

Recommendation: This provision is unreasonably overbroad, repetitious of requirements stated more explicitly elsewhere in the regulations, and should be deleted.

86.21 ADMISSIONS

86.21(b)(2) Specific Prohibitions.—This provision, which requires that a recipient "shall not administer or operate any test or other criterion for admission . . . etc." may very well limit legitimate requirements which are prerequisites for taking or engaging in a given course of study. Also the "test or criterion" ought not be limited to one which validly predicts successful completion of an education program or activity, but might also be one that predicts success in a given field of endeavor.

Recommendation: The following change is proposed: A recipient shall not administer or operate any test or other criterion for admission which adversely affects any person on the basis of sex if such test or criterion is proved by the Department to have neither value in predicting success in completion of the program or activity in question nor value in predicting success in the given field of endeavor.

86.21(c)(3) Prohibitions Relating to Marital or Parental Status.—Whether the provision which requires that institutions should treat disabilities relating to pregnancy, childbirth, miscarriage, abortion or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition has been materially altered by the decision in the U.S. Supreme Court in *Geduldig v. Aiello* is an issue that has been raised by many individuals.

Recommendation: That the department clarify its position with regard to the lawfulness of this provision in light of the *Aiello* case.

86.21(c)(4).—This section provides that no recipient shall make preadmission inquiry as to the marital status of an applicant for admission but may make preadmission inquiry as to the sex of the applicant, if the latter inquiry is made equally of applicants of both sexes and is not made for a discriminatory purpose.

Recommendation: Absent a purpose to discriminate unlawfully, a recipient should be permitted to inquire as to the marital status of applicants because that information is pertinent to the issue of domicile, the principal criterion for residency determinations. The proposed regulations could read as follows: A recipient may make preadmission inquiry as to the sex *or marital status* of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

86.22 RECRUITMENT

86.23(a) Comparable Recruitment.—It is uncertain when remedial action is required. This section also raises the question of how "comparable" will be defined. Is the test of "comparable" the male and female mix in the student body of the high schools and undergraduate schools and programs toward which recruitment activities are directed? Or is it the actual number of potential male and female students contacted? Or will the criteria consist of the resources in money and time spent in recruitment activities directed at members of a particular sex?

Recommendation: The condition under which remedial action is required should be spelled out. Comparable recruitment should be defined as the effort expended by the recipient to make its total program visible to members of both sexes.

86.31 EDUCATION PROGRAMS AND ACTIVITIES

86.31(a) General.—Research is included among the activities to which the paragraph applies. There are legitimate scientific reasons for limiting the human subjects in some research to females or to males. Investigators should not be required to include both males and females as subjects or potential beneficiaries of research. Such interference in research is completely unwarranted and counterproductive and undoubtedly unintended. It would rule out research in obstetrics and gynecology, and limit research in diseases which are more prevalent or serious in one sex than in the other; it would limit current valuable psychological research on ego and sexual development, etc.

Recommendation: There should be included the phrase "except where bona fide sex qualifications are operative."

86.31(b)(7) Specific Prohibitions.—This provision would bar an institution from assisting any organization which discriminates on the basis of sex in providing any benefit or service to students. Implementation of these regulations would appear to require the severance by institutions of any working relationships with social fraternities and sororities. There is seemingly little societal value or interest in mandating that all social fraternities and sororities alter their membership regulations so as to permit membership by both sexes.

Recommendation: That social fraternities and sororities be specifically excluded from coverage under the regulations as not providing a benefit or service to students within the meaning of section 86.31(b)(7) and not constituting an educational program or activity operated or facilitated by a recipient within the meaning of section 86.31(c).

86.31(c) Programs Not Operated by Recipient.—Apparently, the intent of this provision is that programs operated in connection with the educational activities of the recipient institution will be held to the same standards as the recipient institution and that the recipient institution will, in the first instance, be responsible for enforcement. In addition, programs not directly related to the educational programs of the recipient institution are held to a less stringent standard. A "fact sheet" distributed by HEW provides a rather detailed discussion of these points, including the following sentence: "(The Regulations) set out the major criteria to be applied in determining the existence of a violation in this area, which are (1) the *substantiality* of the relationship between the recipient and the organization (including financial support and housing) and (2) the *closeness* of the relationship between the organization's functions and the educational program or activity of the recipient." While this statement in the fact sheet seems clear, there is nothing in the regulations corresponding to it. If this is the intent of the regulations, it should be stated with greater clarity. Moreover, with regard to separate organizations with which the university has some contact in the course of educational programs—e.g. libraries, research institutes, summer intern sponsors, etc.—it seems unnecessarily sweeping to require that the university "insure" that such organizations comply in all regards to the regulations. This would, of course, be extraordinarily difficult—indeed probably impossible—for recipient institutions, and seems an inappropriate role and burden.

Recommendation: In the performance of its duties in educating and training individuals, an institution is unable to control totally all situations in which its students may become involved. Therefore, it is recommended that an institution encourage operators or sponsors of other education programs to prohibit discrimintaion by obtaining a disclaimer of discrimination.

86.32 HOUSING

86.32(b)(2) Housing Provided by Recipient.—This provision requires that housing provided by the institution be proportionate in quantity to the number of students applying and be comparable in quality and cost. Absent clarification in the proposed regulations, it may be asserted by the Office for Civil Rights that the proportionate test must be met each year, or perhaps each semester. The difficulty is that an institution does not know how many applications for a particular type of housing for members of each sex it will have until the applications are actually filed. It is not feasible, at the last minute, to attempt to rearrange housing to correspond precisely to the number of applications, yet this could well be required under a literal reading of the proposed regulations.

Many campuses provide more security arrangements for women's housing than for men's housing. Such difference itself constitutes disparate treatment. Such security may also increase the costs of women's residences compared to men's residences and thus reduce comparability in cost. The rules as stated appear to require adding undesired security in men's housing or eliminating necessary security in women's housing. There should be no such requirement. In addition the regulations should provide for reasonable differences generated by students' self choice.

The purpose of this section of the proposed regulations could be better served by developing language that would require the recipient to take into account the needs and interests of students of both sexes in the long-range planning of its housing. It should be noted that experience at many institutions has shown that student interests, both male and female, change in terms of the type of accommodation desired (suites compared with single rooms, for example).

Recommendation: A recipient shall in conducting both its short-term and long-term planning for housing for students give due consideration to the needs and interests of all students.

In addition, if section 86.32 is retained, it ought to provide a transitional period for bringing a recipient's housing into compliance with the proportionate test, allowing time for adjustments in housing arrangements.

86.32(c)(2) Other Housing.—The phrase requiring an institution to "take such actions as may be necessary to ensure" equal availability of off-campus housing places an unreasonable burden on the institution. Colleges and universities have no control over who decides to list with them, thereby being unable to regulate in any meaningful manner the proportionate quantity and comparable quality required by the proposed regulations.

Recommendation: The word *encourage* should be substituted for ensure.

86.33 Comparability of Facilities.—Since most institutions presently lack comparable shower and locker room facilities for men and women, they may be required to construct new facilities which will be superior in quality to the existing male used facilities.

Recommendation: That in instances where new facilities must be built in order to comply with this section, the use of a cost-quality index shall be permissible.

86.34 ACCESS TO EDUCATION PROGRAM OR ACTIVITY

86.34(a) Course Offerings.—Societal interest in combination with prevailing community standards, common sense, and the right of privacy dictates that some physical education classes be exempted from the coeducational course requirement.

Recommendation: Physical education courses in areas deemed socially sensitive (e.g. weight reductions) or providing for collision contact shall be exempt from the coeducational course requirement as long as comparable courses are offered separately for members of both sexes, whenever sufficient interest is evidenced.

86.34(c) Appraisal and Counseling Materials.—This section would bar the use of different counseling materials for students on the basis of sex. It is recognized, however, that some testing materials may be better predictors for one sex than another.

Recommendation: It is suggested that separate counseling examinations should be permitted where equality of opportunity may be best advanced by using different testing methods, and where different tests are necessary to achieve equal results for members of both sexes.

86.35 FINANCIAL AND EMPLOYMENT ASSISTANCE TO STUDENTS

86.35(a) (i) and (ii) Provision of Financial Assistance.—The proposed regulation should not attempt to affect existing financial assistance programs established by donors in the past that may discriminate on the basis of sex. The legal problems in attempting to reform the applicable legal instruments can prove to be time consuming, expensive, and might result in the loss of the funds to the residuary takers under the trust.

The spirit of the proposed regulation could be met by the requirement that a recipient's existing financial assistance to students, taken as a whole, provide equal opportunity for members of both sexes.

Recommendation: A recipient shall be permitted to accept and administer gifts, grants and bequests restricted to specific recipients or groups so long as the entire financial aid program is administered on a nondiscriminatory basis.

86.35(b) Assistance in Making Available Employment.—This section prohibits a recipient from assisting any agency, organization or person that discriminates in making employment available to any of its students on [illegible] basis of sex.

Recommendation: A standard of "knowing" or "should [illegible] known" should be applied to the proscription against assisting such organizations that discriminate on the basis of sex. Insofar as sex is a bona fide occupational qualification, it should be permitted as a criterion under this provision.

86.37 MARITAL OR PARENTAL STATUS

86.37(b)(3) Pregnancy and Related Conditions.—This provision provides that at the conclusion of a pregnancy leave a "student shall be reinstated to her original status." If a new academic year is involved, a recipient may not be able to guarantee to any of its returning students the same or equally favorable financial arrangements as in the previous year.

Recommendation: A student returning from pregnancy leave should not be in a more favorable position than other returning students. Any implications in the proposed regulations that identical financial arrangements are guaranteed should be eliminated, so that such students are assured only the same consideration as all other returning students.

86.38 ATHLETICS

86.38(a) General.—This section provides that separate teams may be provided where selection is based on competitive skill. A more satisfactory solution to the single-sex team is suggested below.

Recommendation: Section 86.38(a) should be modified to strike "where selection for such teams is based upon competitive skill" and replace it with "when students indicate a preference for separate teams and when activities provided for members of one sex are substantially equal to those provided for members of the other sex."

86.38(b) Determination of Student Interest.—The provision for an annual survey of student athletic interests would, in effect, establish the very troublesome precedent of mandating student participation in institutional decision making. Although institutions do not reject the appropriateness of considering student preferences, it is suggested that this is an inappropriate intrusion by the Federal Government into the institutional governance process.

Recommendation: 86.38(b) should be redrafted to provide that a recipient, at reasonable time spans, shall determine student interest in sports activities, including participating and spectator interest. Such determination shall be deemed advisory in nature and shall not bind a recipient's on-going planning relating to athletic activities.

86.38(c)(2) Affirmative Efforts.—This section provides that a recipient shall "provide support and training activities for members of such sex designed to improve and expand their capabilities and interests to participate in such [athletic] opportunities."

Recommendation: This provision is far too broad in that it would impose on campuses the obligation to develop interest which does not now exist. Substantial efforts to advise members of both sexes of opportunities to participate in athletics would necessarily generate interest in such activities, and that is all the campuses should be required to do—it cannot be required to change "capabilities and interest."

86.38(d) Equal Opportunity.—This section requires that a recipient which operates or sponsors athletics shall make athletic opportunities available to students after taking into consideration that student interest in athletics identified by the campus.

The regulations must recognize that some athletic teams are more expensive than others, and that campuses should be permitted to emphasize one particular sport over another as long as it also makes opportunities available to members of both sexes. Distinctions should be drawn between mandatory student fees and state revenues on the one hand and revenues generated from the athletic events themselves or given to the athletic program from various booster clubs in the community. Unequal expenditures should be permitted for athletic events which generate their own revenues or receive funds from booster clubs, even if one sex dominates that particular athletic activity.

Recommendation: Equal opportunity should be defined as equal opportunity proportionate to the demand or request for the number of sports and level of competition but should not be interpreted to be identical to the number of participants.

Recipients shall be permitted to develop transition plans for the extensive remodeling and conversion of facilities which may be necessary to make required athletic facilities available to both sexes.

86.38(e) Separate Teams.—This section authorizes a recipient to operate or sponsor separate athletic teams for members of each sex as long as the recipient does not discriminate on the basis of sex in the distribution of equipment or supplies for such teams, "or in any other manner."

Recommendation: This provision should be limited to instances of invidious discrimination.

86.38(f) Expenditures.—Since equal aggregate expenditures are not required, would proportionate expenditures be acceptable? If equipment is more expensive for certain activities which attract a greater number of male participants, would women as a result be discriminated against?

Recommendation: A differentiation should be established, in this section, between expenditures for intramural and intercollegiate sports.

86.41 EMPLOYMENT

86.41(a)(2).—This section precludes an employer from limiting, segregating, or classifying applicants or employees in a way which "could" adversely affect any applicant's or employee's employment opportunities or status because of sex.

Recommendation: The use of the phrase "which could affect" is unnecessarily broad and should be replaced with the words "which affects."

86.41(a)(3).—This section provides that a recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting individuals to discrimination prohibited by Title IX.

Recommendation: The use of the phrase "directly or indirectly" is confusing and should be deleted.

86.41(b)(9) Application.—This section provides that the Title IX regulations in regard to employment apply to employer-sponsored activities including social or recreational programs. A distinction should be made between worthwhile, voluntary social clubs such as faculty wives' associations and employer-sponsored activities with substantial employer support such as faculty clubs.

Recommendation: The provision should be amended so as to apply only to such organizations which receive substantial employer support.

86.42 EMPLOYMENT CRITERIA

86.42(a).—This section proscribes a recipient from administering or operating any test or criterion for any employment opportunity which adversely affects any person on the basis of sex unless use of such test or other criterion is shown to predict validly successful performance in a position in question.

Recommendation: This provision should be withdrawn until the EEO Coordinating Council test selection guidelines have been adopted. In the alternative the following provision should be adopted: "A recipient shall not administer nor operate any test or other criterion for employment which adversely affects any person on the basis of sex if such test or criterion is proved by the Department not to predict successful performance in the position in question."

86.43 RECRUITMENT

86.43(a) Comparable and Affirmative Recruiting.—This provision by requiring affirmative recruitment of sexes with limited employment participation rather than affected classes goes beyond the scope of Executive Order 11246. Should scarce resources be devoted to recruiting male nurses and secretaries?

Recommendation: In section 86.43(a) the clause beginning "except that . . ." until the end of the sentence should be stricken and replaced by the following sentence: "A recipient shall not be precluded from taking affirmative attempts to recruit members of one sex."

86.44 COMPENSATION

This section prohibits a recipient from making or enforcing any policy which, on the basis of sex, makes distinctions in rates of pay or compensation.

Recommendation: For uniformity of interpretation jurisdiction over such matters should be vested with the Division of Wage and Hour of the Department of Labor.

86.45 JOB CLASSIFICATION AND STRUCTURE

Recommendation: In order to achieve greater clarity it is suggested that the phrase "which operate to" be deleted in section 86.45(c).

86.46 FRINGE BENEFITS

86.46(a) Fringe Benefits Defined.—The definition ("any employee who is expected to work or has in fact worked at least one semester at half-time or half-time equivalent") ought not to apply to faculty, or certain professional persons when the initial unit of their employment is of semester length.

Recommendation: The time-in-service requirement for faculty and such professionals should be expressed as follows: an individual "who has completed four academic semesters or two calendar years of employment" (thus distinguishing the subgroup from those whose employment is in fact temporary, as with visiting faculty or professianals employed for projects). For the purpose of fringe benefits, students be excluded as, by definition, temporary employees whose employment is assumed to terminate with the termination of student status. The term "permanent" should not be used, since it implies a potential claim to job security similar to that of tenure. The determination of "half-time or half-time equivalent" should be made by institutions and should be based for professionals on total job requirements rather than solely on such numerical measures as classroom hours, stipends, or position count" in a state budget.

Proportionate Fringe Benefits.—The Secretary "seeks comment on the implications of requiring all institutions to provide permanent part-time employees fringe benefits proportionate to those offered full-time employees." Proportionate fringe benefits are not mandated by Title IX. Title IX requires only equal benefits for the members of each class of employees regardless of sex.

Should the Secretary carry out the suggested mandate of proportionate benefits, the following questions need to be clarified before an informed comment on the implications can be made.

(1) The definitional questions posed above.

(2) Acceptable bases for calculating "proportionate." (Proportionate to dollar contributions by the institution, dollar pay-outs, in benefits, length of service?)

(3) The definition of a fringe benefit. Are these only monetary benefits, or are nonmonetary ones to be included (e.g. eligibility for faculty club membership or preferred parking).

In the absence of clarity on these points, a reasonable projection of costs to institutions and employees is impossible to make.

86.46(b)(2).—This section requires that a fringe benefit plan must provide *either* for equal periodic benefits for members of each sex or for equal contributions to the plan by members of each sex. The draft guidelines thus follow the existing Executice Order regulations. However, the Secretary has sought comment as to whether (1) Title VII regulations prohibiting unequal periodic benefits should be adopted, (2) whether the Executive Order approach should be adopted, or (3) whether a third alternative, the so called "unisex" tables, should be the final preferred alternative. The "unisex" proposal would mandate the use of premium or rate tables which do not differentiate on the basis of sex, and would thus require both equal contributions *and* equal periodic benefits. It is noted that to change to single-sex annuity tables could only be accomplished by the insurance industry and not by recipients.

Recommendation: It is strongly urged that the approach taken must lead to a uniform position by all agencies having jurisdiction over this matter.

In view of the difficulty in achieving a simple solution to the matter, it is strongly recommended that the regulations preserve for recipients the options presently available under the Equal Pay Act until such time as an alternative that is demonstrably equitable and practically workable has been presented, considered, and adopted by all agencies.

86.47 MARITAL OR PARENTAL STATUS

86.47(c) Pregnancy as a Temporary Disability.—It is uncertain how this provision would operate in light of the Supreme Court's decision in *Geduldig* v. *Aiello*, especially where a recipient's disability income program is integrated with the state disability insurance system.

Recommendation: That the Department clarify its position with regard to the issues raised by the *Aiello* decision.

86.47(e)(1) Inception of and Return from Pregnancy Leave.—This regualtion would require that an employee cannot be forced to begin pregnancy leave if her physician certifies that she is able to work. The regulation also states that the pregnant woman must notify the employer 120 days prior to the expected birth of a child. This provision treats pregnancy differently from other temporary disabilities and may violate the Sex Discrimination Guidelines of Title VII. Men are not required to notify employers 120 days before elective surgical procedures.

Recommendation: That the proposed 120-day notice requirement be deleted.

86.47(e) (1) and (2).—These sections provide that an employee cannot be forced on maternity leave if her physician certifies in writing that she is capable of performing her duties. Similarly, the employer cannot require the leave to be longer than two weeks after the physician certifies in writing her ability to perform the job.

Recommendation: These provisions treat pregnancy differently from other temporary disabilities and may thus violate the Sex Discrimination Guidelines of Title VII.

86.47(e)(2).—This section permits recipients to compel a woman who takes a leave for pregnancy or childbirth, no matter how short the leave, to remain on leave until the beginning of the first full academic term following her physician's certification that she is able to work.

Recommendation: This provision treats pregnancy differently from other temporary disabilities and may violate the Sex Discrimination Guidelines of Title VII. Pregnancy leave should be treated in the same manner as every other short-term disability.

86.61 COMPLIANCE INFORMATION

86.61(b) Compliance Reports.—This section imposes the obligation on recipients of federal financial assistance to keep records and furnish information and compliance reports at such times and in such form as the Director of the Department of Health, Education and Welfare may determine to be necessary to enable him/her to ascertain whether the recipient has complied with the Title IX regulations.

Recommendation: That the Director should only be able to request such information as is *reasonably* necessary to determine compliance. Accordingly, the section should be amended so as to limit the Director's access to that information reasonably needed to determine compliance.

86.61(c) Access to Sources of Information.—This provision authorizes HEW to have access to all information "as may be pertinent to ascertain compliance" with the Title IX regulations.

The regulations provide for broad access by HEW investigators to confidential records of recipient institutions. While the need for this access in investigating complaints is understood, the requirement that materials obtained in these ways be kept confidential by the Department except in formal enforcement proceedings is of equal importance. The regulations in section 86.61(c) presently state only that "information of a confidential nature obtained in connection with compliance, evaluation, or enforcement, will not be disclosed by the Department except when necessary in formal enforcement proceedings or where otherwise required by law."

Recommendation: The principle of confidentiality should be strengthened by reference to criminal sanctions available against employees of the Department who release such information without authorization. It should also be clearly established that the Freedom of Information Act does not apply to confidential materials obtained pursuant to this provision of the regulations.

How is pertinency to be determined and by whom? It is suggested that questions of pertinency should be addressed to an Administrative Law Judge at the time the question is raised. A recipient should not have to postpone such determination until the date of the formal hearing with regard to the noncompliance allegation. A recipient should also be able to raise questions of privilege and present those questions to an Administrative Law Judge when appropriate.

86.62 CONDUCT OF INVESTIGATIONS

86.62(b) Complaints.—The complainant must be notified "promptly" that the complaint has been received, but there is no requirement that the recipient be notified. Since months or years may elapse before an investigation is begun, recipients will not have the opportunity to resolve discrimination problems before a compliance review because they will not necessarily know that a complaint has been filed against them.

Recommendation: This section should be amended to provide that the recipient shall promptly be served with notice of any complaint filed against it.

86.62(c) Investigations.—This provision directs HEW to promptly investigate whenever "a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part."

Recommendation: It is suggested that the recipient should be advised of the investigation conducted by HEW and given an opportunity to furnish such information as is necessary to clarify or defend the recipient's position.

86.62(d) Resolution of Matters.—This provision provides that recipients will be notified of HEW's initial determination of noncompliance and authorizes a complainant to submit additional information in regard to a complaint which the Director of the Department has determined does not warrant review.

Recommendation: It is suggested that recipients should have all information prior to investigation by the Department so that it may adequately defend its position. It is also suggested that the recipient should be permitted to respond to any additional information furnished to the Department by a complainant.

86.62(e) Intimidatory or Retaliatory Acts Prohibited.—There is seemingly little reason for the provision in this section that allows for interviews by the Director of students or employees without a representative of the recipient being present. That intent of Title IX clearly is to encourage and assist recipients in providing equal opportunity without discrimination on the basis of sex; the recipient can benefit far more than the Director by hearing a complainant's allegations first hand. Further, the requirement that the names of complainants be kept confidential makes the completely untoward assumption that recipients will somehow retaliate against complainants.

Recommendation: It is suggested that this section be amended to permit representatives of the recipient to be present at interviews of its students and employees.

86.63 PROCEDURES FOR EFFECTING COMPLIANCE

86.63(c) Terminaion of or Refusal to Grant or to Continue Federal Financial Assistance.—This provision provides that "any action to suspend or terminate or to refuse to award or continue federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular education program or activity or part thereof in which such noncompliance has been so found."

It is noted that the Fifth Circuit Court of Appeals (*Taylor County* v. *Finch*, 414 F. 2d 1068 (1969)) has interpreted language in regard to the termination of federal financial assistance in Title VI of the Civil Rights Act which is identical to such language in Title IX. In *Taylor*, the court concluded that the statutory limitation on the Department of Health, Education, and Welfare's authority to terminate financial assistance was designed to "insure that termination would be 'pinpointed . . . to the situation where discriminatory practices prevail.' " (p. 1075) The court further observed that "it is important to note that the purpose of limiting the determination power to activities which are actually discriminatory or segregated was not for the protection of the political entity whose funds might be cut-off, but for the protection of the innocent beneficiaries of programs *not* tainted by discriminatory practices." (p. 1075)

Recommendations: (1) The proposed regulations should conform to the judicial construction of the appropriate statutory language. It is, therefore, suggested that the regulation should be amended so as to make clear that they conform to that consruction.

(2) The provisions should be amended so as to prohibit the Department of HEW from terminating financial assistance until the recipient has exhausted its right to a departmental review of that matter.

(3) The regulations should recognize the authority, in appropriate circumstances, of federal district courts to stay the administrative decision to terminate financial assistance pending judicial review of that determination.

(4) That except where noted otherwise in the comments above, the regulations should be revised to make clear that the Federal Government has the burden of proof as to all matters which may lead to termination of financial assistance to institutions of higher education.

86.64 HEARINGS

86.64(c)(2) Procedures, Evidence and Record.—This section leaves the availability of cross-examination up to the discretion of the officer conducting the hearing. Cross-examination ought to be available in all instances, and there appears to be no satisfactory rationale for limiting cross-examination in hearings under the proposed regulations. It is only through cross-examination of all witnesses that accurate findings of fact can be made.

Recommendation: That the right of cross-examination be available in all instances.

WILKINSON, CRAGUN & BARKER,
LAW OFFICES,
Washington, D.C., June 18, 1975.

Re Comments on Proposed Regulations Pursuant to Title IX of the Education Amendments of 1972 concerning Non-Discrimination on the Basis of Sex.

Hon. JAMES G. O'HARA,
Chairman, Subcomimttee on Postsecondary Education, Committee on Education and Labor, Cannon House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: These comments are filed on behalf of our client the College Placement Council which is the only professional association representing university and college placement and career planning officials and their counterparts in business, industry and government in the personnel field. We understand that hearings are scheduled before your Subcommittee on the question of whether the proposed regulations to implement Title IX of the Education Amendments of 1972 are consistent with the statutory authority on which they are based. Pursuant to the invitation contained in your Committee's letter of June 13, 1975 to our office, we are submitting these comments for inclusion in the record of hearings on this matter.

The Council's membership, as well as others engaged in the career planning and placement field at the postsecondary level, are very interested in the provisions of Section 86.38 governing "employment assistance to students". This section is specifically aimed at placement programs conducted by universities and colleges receiving federal funding. It requires such institutions to assure themselves, that, when assisting persons in making employment available to any of its students, "such employment is made available without discrimination on the basis of sex". It also prohibits any covered institution from rendering any services to any other entity "which discriminates on the basis of sex in its employment practices."

The Council supports this section insofar as its intent is to have placement offices assist in the elimination of sex discrimination in employment opportunities for college graduates. However, the text of the proposed regulation appears to extend this responsibility beyond the requirements of law and to impose an open-ended burden on academic institutions far beyond their resources and capabilities. We should note that the regulation as finally promulgated is a revision of an earlier proposed regulation but appears to share the defects of the original proposal.

Universities and colleges cannot be insurers of third party employment practices as the proposed regulations appear to require. The employer has an independent responsibility to comply with the law and, presumably, if it does not, the proper enforcement agency is the Equal Employment Opportunity Commission, as provided under the Civil Rights Act of 1964. Under the law, and as a matter of practicality, the university can be responsible only for taking reasonable steps to assure itself that campus recruiting is conducted on the basis of equal opportunity. It cannot literally "assure itself that such employment is made available without discrimination on the basis of sex" as the regulations state.

Further, the regulations as promulgated, appear to impose an impossibly broad responsibility on universities and other institutions of higher education to refuse assistance to organizations discriminating on the basis of sex in employment. As the regulations are drafted, covered institutions appear to be absolutely prohibited from rendering services to any other entity which actually discriminates with respect to sex in its employment practices, whether or not the institution can be fairly charged with knowledge of the employer's discrimination. It often takes years of investigation and litigation to determine that an employer has practiced illegal discrimination. How can universities and colleges be expected to ferret out the violators instantly and proscribe them from campus recruiting.

Thus, we would suggest that Section 86.38 be revised in conformity with the requirements of law and in accord with the capabilities of the institutions it is intended to cover. We have previously communicated to the Department of Health, Education and Welfare the following suggested revisions:

86.38 "Employment Assistance to Students"

(a) *Assistance in making available employment.*—A recipient which assists any agency or organization or person in making employment available to any of its students:

1. Shall take reasonable measures to assure that on-campus or other recruiting or hiring processes assisted by the recipient are conducted without discrimination on the basis of sex; and
2. Shall not render any services to any agency, organization or person which does not comply with measures instituted by the recipient to eliminate sex discrimination in employment programs assisted by the recipient.

We respectfully suggest that the Congress, by concurrent resolution, find that the provisions of Section 86.38 are not consistent with relevant statutory authority and should be disapproved pursuant to the procedure created by Section 431 (d) and (e) of the General Education Provisions Act.

Yours sincerely,

By Jerry C. Straus.
Wilkinson, Cragun & Barker.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES,
Washington, D.C., June 25, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Labor and Education, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN O'HARA: The Association of American Medical Colleges wishes to submit for your consideration a comment on the regulation for the implementation of Title IX of the Education Amendments of 1972 now under review by the Subcommittee on Postsecondary Education.

Formed in 1876, the Association now represents the whole complex of persons and institutions charged with the undergraduate and graduate education of physicians. It serves as a national voice for all of the 114 operational U.S. medical schools, 58 medical academic societies, and 400 major teaching hospitals. The Association and its membership thus have a deep and direct interest in all issues related to medical education.

Of concern to us at this time is Section 86.21(c)(4) of the Title IX regulation which specifies that "a recipient . . . (s)hall not make pre-admission inquiry as to the marital status of an applicant for admission." The Association objects to this prohibition for the following reasons. Knowledge of the marital status of an applicant, like other biographical data, helps the schools to assess the individual in the appropriate context of his or her background and situation in life. The schools believe that the achievements of an applicant can and should be measured against his or her social circumstances. The accomplishments of an applicant who is married cannot be fully understood or appreciated without knowledge of this aspect of his or her life. It is important to note that such information is desired equally from both male and female applicants and that any judgments made on the basis of this knowledge are applied equally to both sexes.

Further, it appears to us that there is a serious logical inconsistently in this subparagraph which also provides that "A recipient may make pre-admission inquiry as to the sex of an applicant . . . if such inquiry is made equally of . . . applicants of both sexes and if the results of the inquiry are not used in connection with discrimination."

We conclude that prohibition of pre-admission inquiry as to the marital status of an applicant was not the intent of the Congress with respect to Title IX, and we respectfully request that the Department of Health, Education, and Welfare be directed to revise Section 86.21(c)(4) of the regulation in keeping with this conclusion.

Sincerely,

JOHN A. D. COOPER, M.D.,
President.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
College Park, Maryland, June 27, 1975.

Hon. JAMES G. O'HARA,
Chairman, House Subcommittee on Postsecondary Education, Cannon Building, Washington, D.C.

DEAR SIR: I enclose a statement of the Title IX guidelines which I would appreciate your adding to the record of your recent hearings.

Very truly yours,

BARBARA R. BERGMANN,
Professor of Economics.

Enclosure.

STATEMENT TO HON. JAMES G. O'HARA AND THE HOUSE SUBCOMMITTEE ON POSTSECONDARY EDUCATION

I am a faculty member at the University of Maryland and the chairperson of a committee on women's issues of our campus chapter at the American Association of University Professors.

The purpose of my staatement is to bring to your attention the resolution passed by the Board of Regents of the University, on June 20, after the issuance by HEW of the Title IX guidelines requiring equal opportunity for women in athletics, and after many public statements by our campus athletic director, James Kehoe, to the effect that the HEW rules were impractical and unsound. The Board of Regents resolution, which was passed unanimously, said that:

> the University of Maryland act as soon as the guidelines for Title IX become effective, to implement these guidelines with speed and good grace throughout the University; and, further, that the University administration assess the University's compliance with the guidelines and make a report to the Board of Regents and thereafter make regular reports to the Board on the implementation of the guidelines.

The newly elected chairperson of the Board of Regents, Mr. B. Herbert Brown, expressed the sentiment that women were entitled to their day on the athletic field and the gym, and that it was financially feasible and compatible with an excellent athletics program.

When our athletic director denounces equal opportunity requirements, he means he is against increasing the pittance he now spends on women's programs ($30,000 out of a total athletic budget of $2,500,000). He means that he is unwilling to spend on women's programs more than a small fraction of the money he gets from women students each year in the form of athletic fees. He means that he is against an adequate athletics program for women.

I am the mother of two children—a young boy and a young girl. When my children come to college age, will the philosophy of our present athletic director, or the philosophy expressed by our Board of Regents be the operative one? Don't sacrifice my children's right to health, exercise and active recreation to the play-for-pay-attitudes of our athletic directors.

Prof. BARBARA R. BERGMANN,
Department of Economics,
University of Maryland.

GROSSE PT. WOODS, MICH., *June 23, 1975.*

Congressman J. O'HARA,
Rayburn Bulding, Washington, D.C.

DEAR SIR: Hearings on Title IX are now being held—per Detroit News 6-18-75—pg. 10—in Washington.

The secrecy and special interest involvement in the hearings leaves *no* room for *parental* involvement in final decisions. I have no representation and am unable to travel to Washington to testify.

I oppose the sweeping changes that have been proposed—example Congressional Record—2-23-75—page 5767-5780 per the Vocational Organization for Women. This special interest, tax financed, "feminist" group does *not* speak for all Americans! They have every right to speak—but—I do not have the well financed backing—Ford Foundation, Rockefeller Foundation etc.—that would allow me—or my organization—the opportunity to testify on title IX.

The sweeping change—social—forced on Americans when Congress approved Title IX has now been carefully examined. The parents, housewives and homemakers are appalled at the decision of Congress to get mother out of the home, prevent our daughters and sons from really making their own choice about their future.

Educational courses, behavioral modified through values clarification (humanistic teaching) have been designed to indoctrinate the youth of America and make our country anti-nationalist! There is no freedom of choice involved—only governmental control of its citizens.

The written patterns is the same: achieve Zero Population Growth through education or alternative life styles, elimination of sex stereotyping, availability of abortion and contraceptives—and establishment of national policy.

See: White House Conference on Children—1970

White House Conference on Youth—1971

Report on Population Growth and the American Future—1972

American Federation of Teachers and National Education Association Recommendations

Programs developed by the National Science Foundation on population teaching feminist literature

Z.P.G. magazine Equilibrium, January, 1974, Vol. 11, No. 1

State Maternal Health Committees

State Environmental Education recommendations

Senator H. H. Humphrey's '74 S. 3050 reintroduced this year on a national policy.

This is only a partial listing. You—government—cannot "fool" all of the people, all of the time.

The People in Michigan—and across America will be heard—elections are coming up again—the facts will be published.

Congress has gone too far in striving to formulate sexual change in all Americans. We will not accept this immorality. A unisex society is NOT acceptable.

The "women's rights movement" has been prostituted and betrayed. All people deserve their constitutional rights, privileges and responsibilities. I do not believe the Equal Rights Amendment and Title IX will achieve this.

Very truly yours,

Northeast Mother Alert,
Mrs. Linda Haerens,
Legislative Chairman.

University of Illinois at the Medical Center, College of Medicine,
Chicago, Ill., June 9, 1975.

Representative James O'Hara,
Chairperson, House Subcommittee on Higher Education,
House of Representatives, Washington, D.C.

Dear Mr. O'Hara: As one of the 3000 persons who paid for this ad, I am sending you the enclosed copy to urge you to take appropriate action within the scope of your powers to ensure that the affirmative action provisions of Executive Order #11246 are rigorously enforced by the DHEW.

Sincerely yours,

Jean M. Alberti, Ph. D.,
Assistant Professor of Medical Education.

June 5, 1975.

Dear Representative O'Hara: I am writing in support of the New York Times ad placed in April urging Affirmative Action support to universities.

I serve on the University of New Mexixco Equal Opportunity Advisory Committee which recently served as the search committee for selection of an Equal Opportunity Officer for the University. I am the Coordinator of the Women's Center, Division of Student and Campus Affairs, University of New Mexico.

In my almost three years of service, I have been actively involved in all levels of Affirmative Action implementation. I have learned that implementation is a long, slow, process. And further that even a snails pace cannot be maintained without top level support at the institution and top level support from the Legislative and Executive Branches. Now that the laws are passed the Congress and the President must support the spirit of the law as vigorously as the various agencies strive to enforce the letter of the law.

Jean Frakes,
Coordinator, Women's Center, University of New Mexico,
Albuquerque, N. Mex.

Fort Wayne, Ind.,
June 14, 1975.

Hon. James O'Hara,
Chairman, Subcommittee on Higher Education, House of Representatives, Washington, D.C.

Dear Congressman O'Hara: I am writing to you to urge you to support the principle of affirmative action and to help make sure that this principle will be enforced in universities and hiring goals for women and minorities maintained.

In this connection, I would like to add that I sent a mailgram to President Ford, urging him to issue a public statement on behalf of affirmative action in universities. For your information, I am also enclosing a copy of the full-page ad in support of affirmative action which appeared in The New York Times on Sunday, April 6, 1975.

Thank you very much.

Sincerely yours,

Marthe Rosenfeld,
Indiana University.

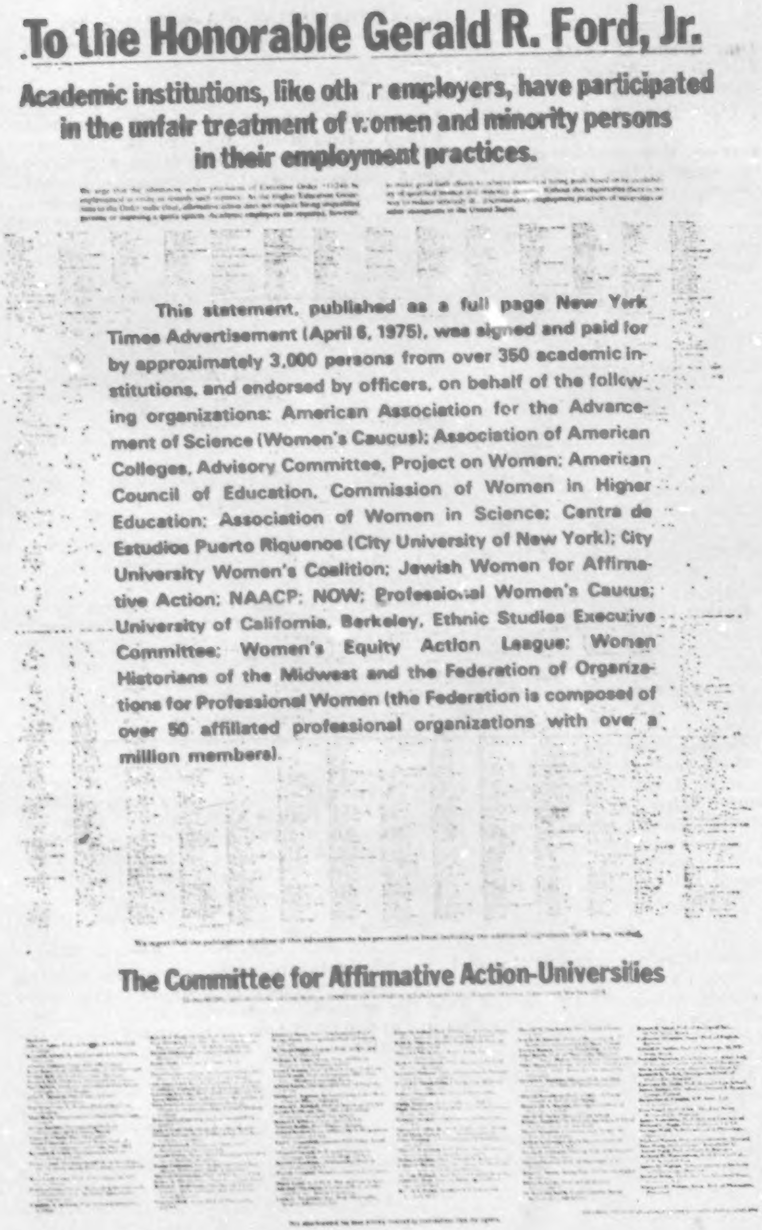
UNIVERSITY OF CALIFORNIA, IRVINE,
Irvine, Calif., June, 12, 1975.

HON. GERALD R. FORD, Jr.,
The White House,
Washington, D.C.

DEAR PRESIDENT FORD: As a female faculty member and a member of various women's organizations, I can assure you that Affirmative Action plans have only begun to achieve amelioration of the discrimination against women and minorities in higher education. I hope you will publicly support strong implementation of the existing legislation for Affirmative Action.

Sincerely,

DR. KAREN LEONARD,
Assistant Professor,
Program in Comparative Culture.



To the Honorable Gerald R. Ford, Jr.

Academic institutions, like other employers, have participated in the unfair treatment of women and minority persons in their employment practices.

This statement, published as a full page New York Times Advertisement (April 6, 1975), was signed and paid for by approximately 3,000 persons from over 350 academic institutions, and endorsed by officers, on behalf of the following organizations: American Association for the Advancement of Science (Women's Caucus); Association of American Colleges, Advisory Committee, Project on Women; American Council of Education, Commission of Women in Higher Education; Association of Women in Science; Centro de Estudios Puerto Riquenos (City University of New York); City University Women's Coalition; Jewish Women for Affirmative Action; NAACP; NOW; Professional Women's Caucus; University of California, Berkeley, Ethnic Studies Executive Committee; Women's Equity Action League; Women Historians of the Midwest and the Federation of Organizations for Professional Women (the Federation is composed of over 50 affiliated professional organizations with over a million members).

The Committee for Affirmative Action-Universities

ARIZONA INTERSCHOLASTIC ASSOCIATION, INC.
Phoenix, Ariz., June 23, 1975.

Hon. MORRIS K. UDALL,
U.S. House of Representatives,
Rayburn House Office Building, Washington, D.C.

DEAR REPRESENTATIVE UDALL: Arizona high schools are greatly concerned as to final Congressional action on Title IX regulations. We strongly urge you to support Representative James Martin's resolution, or if you do not feel you can support this resolution, we would appreciate your introducing a resolution disapproving Section 86.41 of Title IX regulations which relates to athletics.

We find it totally inconsistent for Title IX to mandate athletic programs without funding. Arizona school administrators are placed in an impossible position when Title IX mandates expenditures of funds, and our State Legislature restricts the expenditure of funds. During the last two years Arizona high schools have increased their opportunity for girls sports over 50%. If federal regulations will leave us alone we can solve our own problems.

Your support will be appreciated.

Very sincerely,

H. A. HENDRICKSON,
Executive Secretary.

[Western Union telegram]

COLLEGE PARK, MD., *June 26, 1975.*

Hon. MARJORIE HOLT,
Washington, D.C.

We the undersigned are in complete support of President Darrell Royal and members of the board of trustees of the American Football Coaches Association in the testimony they presented before the House sub-committee on postsecondary education. It is our understanding that there is a resolution before that sub-committee to send the title IX regulations which are part of the Education Amendment Act of 1972 back to HEW for their review and possible revision. We urge you to contact your colleagues on the House Committee of Education and Labor and urge them to report this resolution out of committee. We also urge you to vote for this resolution when it reaches the floor of the House. Title IX regulations, as they are presently worded, can and in all probability will be interrupted in such a way that could destroy inter-collegiate athletics as we presently know them.

Head football coaches: Jerry Claiborne, University of Maryland; Clarence Thomas, Bowie State College; H. C. Gray, University of Maryland—Eastern Shore; Mike Davis, Frostburg State College; Dennis Cox, Johns-Hopkin University; Ronald Jones, Western Maryland College; Philip Albert, Towson State College; assistant football coaches, University of Maryland: John Devlin, Terry Strock, George Foussekis, Gothard Lane, Jerry Eisaman, Joe Krivak, Tom Groom, Gib Romaine, John Hallum, Dick Redding, Thom Park.

PULLMAN, WASH., *June 26, 1975.*

DEAR REPRESENTATIVE O'HARA: I have been following with interest the hearing on Title IX, and while I am a woman I believe that as it now stands it is unsatisfactorily ambiguous and has at least the potential of discriminating very, very badly against existing athletic programs and against men, particularly men in the non-revenue sports. As I recall, the legislation's author, Edith Green, has publicly attacked reverse discrimination.

I realize that a number of sincere women have testified that it is not their intent to raid the treasuries of existing athletic departments. I wish I could feel this is the feeling of all women pushing Title IX and of the HEW representatives who have been hassling college athletic officials.

At any rate, I would suggest declaring a moratorium on the sections pertaining to college athletics until Title IX's financial impact is determined. To wait until the legislation is effective, then correct inequities, is impossible and could kill college athletics. If a moratorium is not instituted, then I think the minimum starting point would be to write into the legislation and the guidelines that no funds from gate receipts or donations to the men's programs be allocated to women's sports. Means should also be taken to spell out the fact that if women want equal scholarships, it is up to them to come up with the money. Some women don't even want scholarships.

To return to the question of whether existing programs would be harmed by the measure as it currently stands, I am sending this statement by Virginia Trotter, which I consider somewhat arrogant. Oh, no, she says, it's really not going to make all that much difference in what happens to Big Red, but "may make a difference" in some schools with "weaker" athletic programs. Just great. That's about 98 percent of the athletic programs. NU is one of few really rich programs in the country, and as you will recall Coach Tom Osborne even testified money for women's sports even burdens their budget. The $80,000 or so NU's athletic dept. is going to have to cough up for women could put many lesser programs out of business.

I heard Ms. Trotter on one occasion suggest that possibly federal funding could be used to finance women's athletics. Fine. If the federal government wants it, let them pay for it; as a taxpayer I wouldn't mind. But in no way do I want any of the money I contribute to my favorite school's athletic program (one of the 98 percent who are having a hard time making ends meet without having to contribute much directly to women's sports) to be siphoned off by HEW regulations.

Thank you for your consideration.

Sincerely,

June Bierbower.

[From World-Herald Bureau]

Ex-UNL Official Doubts Rules Will Hinder Football

(By Mary Quinlan)

Washington—Federal regulations issued this week implementing a three-year-old law against sex discrimination in schools are "a great step forward," according to Virginia V. Trotter, Department of Health, Education and Welfare assistant secretary for education.

So far, most the criticism of the sex equality rules has come from high school and college sports administrators who contend that more emphasis on women's athletics will hurt major revenue-producing sports.

Dr. Trotter, former vice chancellor for academic affairs at the University of Nebraska-Lincoln, said she "can't conceive that it's really going to make all that much difference in what happens to Big Red."

The rules "may make a difference in some schools" with weaker athletic programs, she said.

DEVANEY PRAISED

Dr. Trotter praised Athletic Director Bob Devaney for being "very supportive" of federal efforts.

Officials from HEW's Office of Civil Rights have already met with UNL officials to discuss implications of regulations, she said.

Nebraska is "well on the way to compliance" with the rules requiring equal sports opportunities for men and women, she said.

Regulations implementing the 1972 law apply to some 16,000 public school systems and nearly 2,700 post-secondary institutions as a condition for receiving federal money.

"GETTING READY"

Unless the rules are disapproved by Congress, they go into effect July 21.

"We've worked with education associations, school, colleges and universities and have tried to be as fair and sensible about writing these so they can be carried out to the benefit of students and faculty," Dr. Trotter said.

There's "lots of evidence" that schools "have been getting ready" to implement the sex equality rules, she said.

"Understanding what it's all about may be pretty traumatic (at first)," she said. "But as they (school officials) work with it, they'll find it's easier" than they might think now.

"Readjustment in terms of funds and curriculm" will be required for most schools, she said.

"If people are really unhappy," Dr. Trotter said, urging Congress to change the law is their only recourse.

Right on!

TEXTBOOK DISPUTE

While sports fans criticize the rules for what they see as a threat to their favorite programs, other critics, especially women's activist groups, say the rules don't go far enough.

HEW officials rejected a proposal backed by women's groups that would have outlawed the use of federal funds for "sexist" textbooks.

HEW legal advisers said such a rule would be unconstitutional and not in keeping with the tradition of local education responsibilities, Dr. Trotter said.

"I feel we (federal officials) do have a responsibility to work with textbook people and curriculum people to see that textbooks are nondiscriminatory," she said.

Lack of rules on textbooks "doesn't mean we're ignoring the textbook problem," she said, "but we're working with them (publishers) through persuasion."

"BIASES SHOWING"

Under the controversial rules on athletics and physical education classes, sexes may be separate for contact sports like football, basketball or ice hockey and may be separate if ability in a particular sport is the criteria used in form competition.

Even with contact sports, a school may not refuse to offer a team for girls if there is enough interest to establish one.

Physical education classes may not be segregated by sex if noncontact sports are involved, even as an elective class.

Dr. Trotter acknowledged that some students may be "mortified" at having to take phys ed classes with members of the other sex.

"This is just our biases showing," she said. "It's one of the things we've got to get over."

[Western Union telegram]

ORONO, MAINE, *June 24, 1975.*

Hon. JAMES G. O'HARA,
Washington, D.C.

Men's and women's intercollegiate athletics need your support on HR 311, which disapproves sections 86.41 and 86.37C of the implementation regulations (title 9).

HAROLD WESTERMAN,
Director of Athletics, University of Maine, Orono, Maine.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
Athens, Ga., June 26, 1975.

Hon. JAMES O'HARA,
Chairman of the Subcommittee on Postsecondary Education, Cannon House Office Building, Washington, D.C.

DEAR SENATOR O'HARA: The committee which drew up the provisions for H.E.W.'s Title IX has gone completely overboard in the proposed rulings about sex discrimination. They have grossly misinterpreted what American society wants and have listened only to a bunch of radical people. The American Association of University Women, the Athens Branch of which I am president, is alarmed at the several proposals. In particular we strongly object to Sect. 86.31 (b)(7) in Title IX, which forbids an institution that receives federal funds to assist in any way a group which discriminates by sex. This will be destructive not only to American public higher education but also to the communities in which our benevolent colleges and universities are situated.

We are also not in agreement with Sect. 86.34, which unreasonably prohibits the separation of physical education according to sex. Already so many absurd situations have occurred in our locality, where mixture of the sexes was attempted in classes of this sort, that the projected problems could become serious.

I hope that you and your committee will have sufficient knowledge and courage to make the right decisions in deleting the aspects in H.E.W.'s Title IX which will destroy the very fabric of American life. I suggest that you call a complete halt to the passage of the title and request that each and every provision again be carefully evaluated with the advice of more rational people.

Yours sincerely,

PATRICIA ZIOMEK,
President, Athens Branch.

ATHENS BANNER-HERALD AND THE DAILY NEWS,
Athens, Ga., June 25, 1975.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

SIR: There is a nationwide scare campaign being conducted by the NCAA against the guidelines set down in Title IX regarding the equality of opportunity in athletics. Title IX has been too long in coming; its provisions should be delayed no longer.

I am enclosing my column from the Sunday, June 22, 1975, edition of The Athens Banner-Herald and The Daily News which states my position in Title IX and the attendant NCAA scare campaign. I am also enclosing a story which moved on the wires of United Press International tonight that I think is typical of the misinformation and scare tactics being used.

Thank you.

JOHN FUTCH,
Sports Editor.

[From the Athens Banner-Herald and the Daily News, June 22, 1975]

Keep an eye on Washington, friends—the scare campaign is on.

The President signed the long delayed Title IX guidelines a couple of weeks ago and the crocodile tears have raised the Potomac a foot and a half since hearings started on the bill.

The NCAA's reaction was quick and predictable: "Title IX will kill college athletics as we know them" is the official party line. An impressive array of athletic figures has already appeared before a house committee studying the guidelines parrotting the doomsday message.

Darrell Royal of Texas told the committee that the guidelines would have a "destructive economic impact" on all college sports if enacted.

"Eventually I can see a dying process for all athletics—for both men and women. I can't see that they will do anything but eliminate, kill or seriously weaken the programs we now have in existence," Royal moaned.

An old country boy like Darrell should recognize horse manure, especially when he's generating it.

The reasoning for exempting intercollegiate sports from Title IX is telling. Royal and his delegation from the American Football Coaches' Association opined that intercollegiate sports are self-supporting, relying principally on revenues generated by foodball and basketball programs for men, and said that colleges simply can't afford to drain off money for women's programs *without hurting those for men* (emphasis added).

Without hurting those for men?

"These rules will weaken our programs to the point where people won't buy tickets to see them," Royal added.

NCAA President Dr. John Fuzak said Friday that the regulations are designed to "destroy" major college football and basketball programs by mandating the use of revenue-producing sports to equally support support all athletic programs for men and women, a mind-boggling and inaccurate interpretation of Title IX.

Title IX, Dr. Fuzak to the contrary, talks about equal opportunity but specifically states that equal opportunity does not, does not, mean equal expenditure.

Dr. Fuzak revealed his understanding of women athletes in another telling exchange. Women, he said, until five or six years ago, preferred "play days" to varsity competition. "They believed that intense competition was harmful," he said.

Sounds like he had been reading the idiotic prattle of the Sage of Marietta St., Furman Bisher, who continually makes public his fetish about the female sweat glands. Bisher admitted last week that he was "under the impression that women were getting all the exercise they wanted in intramurals and physical education classes. And more. Ninety-eight percent of them at least. The other two percent would probably be happier majoring in boilermaking or arm-wrestling, anyway."

The unfortunate thing about the knee-jerk, doomsday attitude of the NCAA and the rubbish generated by some media spokesmen like Bisher is that they cloud the real issues involved.

Sport, and particularly intercollegiate sport, is going through a traumatic period. There will be changes and, in spite of Title IX and the NCAA, sport will survive.

Those intent on maintaining the status quo will find it a disquieting time. As Dr. Jean Simmons, president of the Federation of Organizations for Professional Women, told the House committee, the Congressional mandate on equal opportunity included no "ifs."

"It did not," she said, say this law will take effect only if convenient, only if it does not hurt anyone's revenues or only if it does not rock the boat."

There are times when the boat must be rocked, no matter who it scares.

[From United Press International wire, June 25, 1975]

STILLWATER, Okla. (UPI)—Oklahoma State football coach Jim Stanley today urged sports fans to write their congressmen in an attempt to block implementation of a federal guideline covering women's athletics.

Stanley said the rule by the Department of Health, Education and Welfare could seriously harm college athletics by requiring equal funding for women's and men's athletics.

"We're not against women's athletics," he said. "We feel like women have a place, especially in the non-revenue sports and we feel like this certainly would hurt football."

The new rule, known as Title IX, "will drastically alter the structure of collegiate athletics" and the OSU sports program if it goes into effect, Stanley said.

AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS,
College Park, Md., June 25, 1975.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: Would you please recommend that Title IX not be further watered down but passed promptly. Sports are an educational experience and women should have more equal programs and opportunities in this area. Women should have grant in aid opportunities. The athletic budget at the University of Maryland is reportedly over 2 million. But women have only about $30,000 spent on their programs. I am opposed to revenue producing sports being treated separately because they, like other sport services, have been subsidized by tax money. Due to over emphasis on sports (revenue producing) on many campuses, grave abuses have occurred. Support of Title IX would result in producing better programs for both men and women.

Sincerely,

ANNE INGRAM,
President.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA
COLLEGE RETIREMENT EQUITIES FUND,
New York, N.Y., June 26, 1975.

Hon. JAMES G. O'HARA,
Chairman, House Subcommittee on Postsecondary Education, Cannon House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: Teachers Insurance and Annuity Association and College Retirement Equities Fund (TIAA-CREF) support the substance of Title IX Regulations section 86.56(b)(2) as signed by President Ford, which provides that a recipient of federal financial assistance shall not ". . . participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex or for equal contributions to the plan by such recipients for members of each sex. . . ."

Attached herewith please find a copy of the Memorandum submitted to the Department of Health, Education and Welfare on behalf of Teachers Insurance and Annuity Association and College Retirement Equities Fund on October 15, 1974, in response to the invitation for comments on the proposed regulations for implementation of Title IX of the Education Amendments of 1972. Also attached is a copy of the transcript of the Hearings before the Special Subcommittee on Education of the Committee on Education and Labor of August 14th, 1974, which include statements made by Donald S. Willard and JoAnn G. Sher on behalf of Teachers Insurance and Annuity Association and College Retirement Equities Fund.[1]

We respectfully request that this letter and attachments be included in the Official Record for the Hearings before the Subcommittee on Postsecondary Education of the House of Representatives Committee on Education and Labor, which were held on June 17th, June 20th, June 23rd, June 24th, June 25th and June 26th, 1975.

Thank you.

Very truly yours,

JoANN G. SHER,
Associate Counsel.

STATEMENT OF DR. WILLIAM C. GREENOUGH, CHAIRMAN, TEACHERS INSURANCE AND ANNUITY ASSOCIATION COLLEGE RETIREMENT EQUITIES FUND

I am William C. Greenough, Chairman of the Teachers Insurance and Annuity Association (TIAA), and its companion organization, the College Retirement Equities Fund (CREF). With me today are Robert M. Duncan, who is a Fellow of the Society of Actuaries and is TIAA-CREF's Executive Vice President and Actuary, and JoAnn Sher, Assistant Counsel to TIAA-CREF and chairman of our Fair Annuity Benefits committee.

TIAA-CREF

The Carnegie Foundation for the Advancement of Teaching, working closely with higher education, established TIAA in 1918 as a special purpose nonprofit life insurance company under New York Laws. CREF was established in 1952 by a special New York Act as a companion nonprofit corporation.

The purpose of TIAA as stated in its charter "is to aid and strengthen nonproprietary and nonprofit-making colleges, universities and other institutions engaged primarily in education or research by providing auuities, life insurance, and sickness and accident benefits suited to the needs of such institutions and of the teachers and other persons employed by them on terms as advantageous to the holders and beneficiaries of such contracts and policies as shall be possible." TIAA provides fixed dollar annuities, and CREF, with a parallel charter, provides variable annuities to the same institutions and individuals that TIAA serves. Together, TIAA and CREF provide fully and immediately vested, fully funded, portable retirement programs that are in effect at 2,600 institutions and covering 400,000 staff members.

PENSIONS UNDER THE TIAA-CREF SYSTEM

For a few minutes I would like to talk abou thow the colleges with TIAA-CREF actually treat their employees compared with treatment of employees under other types of plans.

TIAA-CREF pension plans focuse upon the individual plan participant. Retirement plan benefits earned in each year are purchased and paid for in that year. Thus, an educational institution with a TIAA-CREF pension plan full discharges that employer's responsibility to the individual employee in each year of participation. Nothing subsequent to the finishing of a period of employment affects the employee's benefits earned in that period. As a result, an individual can work for one employer within the TIAA-CREF system throughout his or her career, can shift among several employers, can drop out of employment for a period of time to get a Ph.D., can have a child, can raise a family, can reenter the employment market, can go into government service; or, as a matter of fact, can get fired or laid off in a retrenchment, all without affecting pension benefits previously acquired.

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[1] 1974 transcript not reprinted here. See printed hearings, as identified above, entitled "Federal Higher Education Programs, Institutional Eligibility, Part 2A, Civil Rights Obligations," p. 143.

This is in contrast to the treatment of employees under the great majority of public employee and private retirement systems. There, retirement benefits are generally contingent upon a man or woman's employment with one employer from five to fifteen or more years in order to qualify for full benefits, even under the newly-passed pension legislation.

TIAA–CREF's immediately vested, fully funded, and portable pensions were referred to during the recent Congressional deliberations on private pension reform legislation as the model plan after which all private and public pensions should be more closely patterned.

TYPES OF PENSION PLANS

Nearly all colleges in the country have faculty retirement plans, while only about one-half of the workers in private employment have any pension coverage beyond Social Security.

Retirement systems normally found in public and private employment provide a specified level of benefits to those employees whose term of employment meets the plans' requirements—but reduced or no benefits for those who leave before complete vesting. Employer contributions are zero for persons who leave before vesting, are very small for younger workers and very large for older workers, and are smaller for those men than for those women who remain until retirement. All of these variations do violence to equal-pay-for-equal-work principles.

The TIAA–CREF system is able to provide benefits fully owned by individuals. Under its plans, a specified proportion of total salary is set aside on behalf of each and all individual plan participants in the form of monthly annuity contributions. This stated percentage of current salary set aside as deferred compensation is true equal pay for equal work, and is not contingent upon continuing in employment.

In practice, this means that the average college teacher receives greater lifetime benefits than his or her counterpart in industry. Historically, a larger number of women than men have left their jobs before vesting. This deprives them of pension benefits under state and industrial plans. By contrast, they receive immediate and full vesting of benefits upon plan participation under college plans with TIAA–CREF.

The TIAA–CREF pension system provides more benefits to more plan participants than do typical industrial plans, so, naturally, it is more expensive. TIAA's cooperating institutions typically contribute to the pension plan an amount equal to 12½ percent of covered payroll—two or even three times the amount necessary had they adopted other types of pension plans. The colleges' treatment of woman participants in their TIAA–CREF retirement plans—and the men participants also—is well ahead of their treatment in other types of pension plans and far ahead of treatment by "no plan" employers. It is ironical indeed that the college plans are pointed to as being "unfair" to women. The colleges' commitment to a high standard of individual equity is demonstrated by their willingness to continue to assume the high costs of this type of plan in the face of their recent severe financial difficulties.

It is unfortunate that the issue of equal lifetime versus equal periodic benefits under the single life annuity option has clouded any discussion of the real and actual retirement security offered by our colleges to their men and women employees compared with other employments.

COMPULSION, OR CHOICE?

Let's look directly at the choices before us. Alternative A imposes a specific narrow concept, the approach that single life annuity options, among the many retirement options available, must provide the same *periodic* benefits to women as to men of the same age and history of plan participation. Alternative B also provides that as one choice. But in addition, Alternative B allows the choice of equal pay for equal work providing equal lifetime benefits under all options. Thus, it allows colleges and their staff members to choose an approach best suited to their situations, requirements, and judgments as to what is fair.

At issue here is not a question of whether participants under TIAA-CREF get benefits—they all do, for under the TIAA-CREF immediately vested plans, every participant is assured of benefits; whereas Alternative A does nothing for employees under plans where they do equal work but don't do it long enough for any benefits to vest.

At issue here is not a question of benefits for a couple during retirement—the options available for a couple of comparable ages under TIAA-CREF plans provide the same periodic benefits regardless of whether the employee is a man or a woman. So, the only issue is whether the periodic amount for a woman selecting single life options should be raised above its actuarial value in order to achieve equal periodic benefits.

It is not a question of adequacy of retirement benefits. Our participating institutions use as a standard of adequacy a guideline jointly adopted by the American Association of University Professors and the Association of American Colleges. Under this guideline, post-retirement disposable income for long-term participants should be two-thirds of the disposable income immediately before retirement, "with provision for continuing more than half of such retirement income to a surviving spouse." Current funding for over 95 percent of our individual participants is at a rate sufficient to meet the guideline's standard for couples. When there is no spouse, the one-life annuity can be substantially greater than called for by the AAUP-AAC guideline.

It is a question of whether the TIAA-CREF system can continue to provide pensions that are in all respects fully funded, immediately vested, and portable. The very features that make TIAA's plans so attractive also make them vulnerable when changes, such as those implied by Alternative A, are suggested.

The TIAA-CREF system is vulnerable because it allocates exact benefits to specific individuals in the year that they are earned. The specificity of these benefits is a result of the system's immediate vesting and funding and, in turn results in portability. The level of benefits is determined by scientifically applied actuarial factors, and formulae that translate mortality experience, interest earnings and expenses into annuity rates. These tables and formulae are "fair" in the truest possible sense—each participant will, upon retirement, receive an annuity with a prospective value exactly equal to the total fund accumulated on his or her behalf.

At issue is a choice between Alternative B, which allows for either equal cost for equal actuarial benefits *or* greater cost for equal periodic benefits, and Alternative A, which, in order to achieve equal periodic benefits, requires colleges to raise benefits above their actuarial value for those women who select single life options.

IF ALTERNATIVE A IS CHOSEN:

At risk is the colleges' right to continue to choose a fair retirement plan that provides full actuarial equality for all participants at all times.

At risk is an extraordinarily successful pension arrangement with the unique characteristics of immediate vesting, full funding, and portability provided through individual contracts that assure payment of benefits regardless of the later attitudes and fortunes of the employer. Instead of establishing a standard that encourages, or at least permits, all pension plans to adopt these desirable features, the OFCC is considering a restrictive standard that discourages or endangers them.

Every suggested method for providing equal periodic benefits to men and women under single life options has contained serious defects that would result in impaired portability, serious discrimination against one or more groups, inappropriate burdens being place upon the employer or, worst of all, the ultimate breakdown of the whole philosophy of the college retirement system.

SUMMARY

If there is a fundamental unfairness, a discrimination, it is in the manner that life—or rather death—treats men. Death arrives on average four years earlier for men than women. Is it, then, unfair to make sure that men as a group receive back over their shorter lifetime the savings that have been set aside for their and their wives' retirement? Is not the burden of proof heavily on those who would discard known data and sound actuarial principles, and, under certain suggestions that have been made, divert money from male employees and their wives to support single female employees? Is not the burden of proof on those who are willing to run the danger of disrupting the one nationwide fully transferable and funded pension plan?

There is no way to "wish away" the fact of women's longer lifespan by stating that it doesn't exist. In one way or another, plan contributions must be greater for women or periodic benefits under the single life retirement option must either be less or subsidized by reducing men's benefits.

Thus we support your Alternative B, which is the only one of the alternatives presented that provides the right for higher education to continue to provide equal pay for equal work through the provision of actuarially equal benefits.

MEMORANDUM

I. INTRODUCTION

This memorandum is submitted on behalf of the college retirement system administered by Teachers Insurance and Annuity Association, College Retirement Equities Fund (TIAA–CREF) in response to an invitation for comments on regulations proposed by the Office of Civil Rights of the Department of Health, Education, and Welfare (HEW) "to effectuate Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 *et seq.*). . . ." 39 Fed. Reg. 22228–22240 (June 20, 1974). Title IX prohibits sex discrimination in federally-assisted education programs, including employment discrimination by educational institutions receiving federal financial assistance. These comments are concerned solely with the proposed standards prohibiting discrimination in fringe benefit programs made available to employees. Specifically, Section 86.46(b)(2) provides:

> (b) *Prohibitions.*—A recipient shall not:
>
> * * * * * * *
>
> (2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex. . . .

This provision is consistent with the present Sex Discrimination Guidelines of the Office of Federal Contract Compliance (OFCC) and with comparable interpretations of the Wage and Hour Administrator under the Equal Pay Act. TIAA–CREF supports the adoption of Section 86.46(b)(2).

The introduction to the proposed regulations invites comments on three alternative positions on discrimination in fringe benefit programs, including Section 86.46(b)(2) as quoted above. 39 Fed. Reg. at 22230–22231. The second alternative is the position first taken by the Equal Employment Opportunity Commission (EEOC) in its 1972 revision to its Sex Discrimination Guidelines.[1] Under this provision EEOC has asserted that pension plans like the college retirement system administered by TIAA–CREF, which involve equal employer contributions for equally-situated men and women, as well as retirement benefits which are actuarially equal, nonetheless discriminate on the basis of sex since the life expectancy advantage of females over males results in lower periodic benefits for women under certain retirement options.[2] The third alternative would "mandate the use of premium rate tables which do not differentiate on the basis of sex. . . ."

There are four federal prohibitions against discrimination on the basis of sex in the employment practices of colleges and universities:

1. The Equal Pay Act of 1963, Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 206(d), makes it unlawful for a covered employer to discriminate in compensation on the basis of sex between employees performing "equal work." The Equal Pay Act is administered and enforced by the Secretary of Labor.

2. Executive Order 11246, as amended by Executive Order 11375, prohibits federal contractors from, *inter alia*, discriminating in employment on the basis of sex. The administration of the Executive Order is supervised and coordinated by the Office of Federal Contract Compliance within the Department of Labor.

3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, prohibits employers from, *inter alia*, discriminating as to compensation on the basis of sex. Title VII is administered and enforced by the Equal Employment Opportunity Commission.

4. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, provides that no person shall be subject to discrimination on the basis of sex

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[1] 29 C.F.R. § 1604.9 (e), (f) (1972).

[2] EEOC Decision No. 74–118, CCH EEOC Dec. ¶ 6431 (April 26, 1974).

under any education program receiving federal financial assistance. Title IX is administered by the Department of Health, Education and Welfare.

To date only the EEOC, among these regulatory authorities, has asserted that the type of pension program provided in the TIAA–CREF college retirement system discriminates on the basis of sex. Not even EEOC has asserted that use of "unisex" tables, as suggested in HEW's third alternative, is the only means of complying with its revised guidelines.[3] The discussion which follows reviews the current agency positions and the serious consequences for important features of the college retirement program which could result if the EEOC position or mandatory "unisex" pensions were required by HEW. It then demonstrates that these alternatives are contrary to the provisions of Title VII, the manifest intent of Congress, as well as basic concepts of logic and equity.

A. Current Administrative Positions

The present conflict in administrative interpretations on sex-based discrimination in compensation was created by EEOC's change of position in 1972. The initial Sex Discrimination Guidelines stated that the equal pay for equal work standards of the Equal Pay Act would be applied in determining unlawful sex discrimination in compensation under Title VII and that relevant Wage and Hour interpretations would be adopted.[4] Moreover, EEOC decisions have applied the equal pay standards and have indicated that employers could rely on Wage and Hour interpretations on equal pay issues.[5] By 1969, however, EEOC was finding "reasonable cause" to believe that certain wage differentials between male and female employees constituted unlawful sex discrimination under Title VII without respect to whether they were permissible under the Equal Pay Act.[6] In that same year, an EEOC representative stated that the Commission had found it necessary "to go beyond" the equal pay standards in dealing with specific factual situations and that it was reconsidering its position in the insurance area.[7] The EEOC did not state a further position on this subject until the revision of its guidelines in 1972, when it declared that it would no longer consider itself bound by Wage and Hour equal pay interpretations[8] and that pension plans which differentiate "in benefits on the basis of sex" violate Title VII.[9]

Section 60–20.5 of the current OFCC Sex Discrimination Guidelines reflects a clear decision by the Department of Labor to apply Equal Pay Act standards to questions of sex discrimination in compensation under the Executive Order. This is apparent not only in the explicit directive to OFCC to consult with the Wage and Hour Administrator on matters covered by both the Act and the Order, but also in the provision that "the employer will not be considered to have violated . . . [the] guidelines if his contributions are the same for men and women or if the resulting benefits are equal."[10] This latter provision adopts the interpretation of the Wage and Hour Administrator set forth in Section 800.116(d) of the Equal Pay Interpretative Bulletin.[11] In an opinion letter of August 25, 1970, the Administrator specifically held that pension contributions are "wages" subject to comparison under the Act and that the test of Section 800.116(d) applies to pension plans.[12]

On December 27, 1973, OFCC invited public comments on proposed revisions to its Sex Discrimination Guidelines. 38 Fed. Reg. 35336–35338. Section 60–20.3 (c) of the proposed guidelines contained alternative and inconsistent provisos to the basic prohibition against discrimination in fringe benefits. "Alternative A" is the position adopted by EEOC in 1972. "Alternative B" is the current OFCC/Wage-Hour position.

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[3] In EEOC Decision No. 74–118, *supra* note 2, the Commission stated "the use of such [unisex] tables . . . is only one of several possible ways to remedy the situation Respondents find themselves in. . . ." CCH EEOC Dec. ¶ 6432 at p. 4153 n. 7.

[4] 29 C.F.R. §§ 1604.7 (a) and (b) (1971); see discussion of Section 703(h) of Title VII in Attachment C.

[5] Decision No. 71–1462, CCH EEOC Dec. ¶ 6219 n. 1 (March 1, 1971); Decision No. 72–0324, CCH EEOC Dec. ¶ 6303 n. 2 (August 18, 1971).

[6] Decision No. 70–112, CCH EEOC Dec. ¶ 6108 (Sept. 5, 1969). *See also* Decision No. 70–695, CCH EEOC Dec. ¶ 6148 (April 13, 1970).

[7] Pressman, *Sex Discrimination and Fringe Benefits Under Title VII of the 1964 Civil Rights Act*, CCH Empl. Prac. Guide, ¶ 8004 (April 16, 1969).

[8] 29 C.F.R. § 1604.8(c) (1972).

[9] 29 C.F.R. § 1604.9(f) (1972).

[10] 41 C.F.R. § 60–20.3(c).

[11] 29 C.F.R. § 800.116(d).

[12] BNA Wage & Hour Man. 95:656. This position was recently reaffirmed by an opinion letter which recognized the conflicting EEOC interpretation, but stated "we do not anticipate any change in our position in the immediate future." Wage & Hour Opinion Letter No. 1276 (WH–224) April 26, 1973. *Cf.* Inland Steel Co. v. NLRB, 170 F. 2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949).

In response to this invitation approximtely 600 comments were filed with OFCC.[13] Though the proposed guidelines covered a broad range of topics, approximately 80 percent of the comments were submitted by colleges and universities in support of "Alternative B."[14] Based on these comments, OFCC decided to hold public hearings on Alternatives A and B. These hearings were held on September 9 and 10, 1974. Along with other interested parties, representatives of TIAA–CREF appeared and submitted expert testimony.

In its capacity as the compliance agency for the academic community under Executive Order 11246, as amended, HEW is required to follow the interpretations of OFCC. Indeed, the Higher Education Guidelines, transmitted to college and university presidents on October 1, 1972, specifically adopted the present, OFCC/Wage-Hour position on sex discrimination in pension programs, though the contrary EEOC position is noted.

While so-called "unisex" tables are often mentioned as one means for complying with the current EEOC guidelines or "Alternative A" of the proposed OFCC guidelines, no agency to date has mandated the use of such tables. As noted above, EEOC considered "unisex" tables as "only one of several possible ways" to comply with its position on fringe benefits.[15]

B. Effect of EEOC's Position

While none of these administrative interpretations has the force of law which by itself requires employer compliance, each would normally be entitled to deference by courts called on to decide cases involving the respective statutes or orders.[16] If the courts should ultimately follow the EEOC position prohibiting any differentiation in periodic benefit payments, regardless of cost considerations, the approach to pensions followed by the TIAA–CREF college retirement system[17] and most other "Defined Contribution" plans[18] would be oulawed.

Under the typical plan, the employer and employee contribute fixed percentages of the employee's salary monthly. These contributions are exactly equal for employees earning the same salary regardless of sex and provide an immediately vested, fully funded and broadly portable[19] plan.[20]

The absence of these features in most industrial and governmental plans which are classified as "Defined Benefit" plans[21] created the impetus for the recent enactment of the Employee Retirement Income Security Act of 1974, P.L. 73–406, 88 Stat. 829. Senator Jacob Javits, in testifying before the House Ways and Means Committee on this legislation, stated, "We need to learn something from the success of the College Teachers Retirement System—'TIAA-CREF'—which would be a real model for private industry. . . .[22] However, the new pension legislation only partially secures to employees in industry the benefits and protection enjoyed by participants in the TIAA–CREF college retirement system.[23]

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[13] BNA Daily Labor Report No. 149 at A–1 (August 1, 1974).

[14] *Id.*

[15] *See supra* note 3.

[16] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 434–435 (1971); Brennan v. City Stores Inc., 479 F. 2d 235 (5th Cir. 1973); *but see* Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

[17] The TIAA program was initially established in 1918 as a result of a study financed by the Carnegie Foundation to provide a viable pension system for those engaged in higher education as a means of enhancing their status. The basic program was modified in 1952 with the creation of College Retirement Equities Fund, the first variable annuity to provide protection against the devastating effects of inflation through investments in equities on behalf of participants.

[18] Defined Contribution plans such as those of TIAA are clearly authorized as pension programs involving equal contributions under Wage and Hour interpretations of the Equal Pay Act. 29 C.F.R. § 800.116(d); Wage and Hour Opinion Letter No. 1276 (WH–224), April 26, 1973. They could also qualify as programs providing equal benefits since their payments are based on the best available actuarial data to insure that periodic payments expend the accumulated funds as fully and fairly as it is possible to do. See Attachment A and discussion at pp. 17–22, *infra*. However, since the actuarial tables used result in a lower level of periodic payments to women than men, EEOC considers that such Defined Contribution plans violate its revised Guidelines and Title VII.

[19] Over 80% of private, four-year colleges and universities and one-third of the public institutions participate in TIAA–CREF. If an employee transfers to a non-participating institution, contributions may be continued individually or the contract may be left on a paid-up basis.

[20] In addition, the regular and nondiscriminatory funding of TIAA–CREF plans makes it possible for employees to allocate all or a part of the employer's contribution between the fixed income investments of TIAA and the equity investments of CREF and assures that men and women with the same employment histories will reach retirement with identical accumulations of retirement contributions. At the time of retirement, when each annuitant is best able to judge personal needs, he or she may select from a wide range of benefit options. The periodic level of benefits is then actuarially calculated based on the age and sex of the participant in light of the benefit option selected. The difference in periodic payments based on sex will vary with the option selected. It is most pronounced under a straight, single life annuity. The difference narrows where a guarantee period is added, and disappears under certain joint life options. *See* Exhibit 1.

[21] Under such plans, pension commitments are made in the form of "retirement income credits"—a promise to pay a predetermined percentage of salary for each year or final years of empoyment. However, the vesting of such commitments is generally quite limited and delayed and as a result many participants in such plans do not qualify for benefits. *See* Preliminary Report of the Private Welfare and Pension Plan Study, 1971, Subcommittee on Labor, 1st Sess. at p. 8. The absence of early vesting from most pension plans has a particularly severe impact on women who move in and out of the work force with greater frequency than men.

Defined Benefit plans normally provide equal periodic payments under a single life annuity option to similarly situated employees of both sexes who are of the same age. This necessitates a greater accumulation and disbursement of funds for women than for men to provide payments for the longer average life of women and results in unequal periodic payments in favor of women under the other options.[24]

Short of switching to Defined Benefit plans with all of the disadvantages for participants, or requiring all insurers and pension plans to utilize "unisex" tables—illusory as they would be,[25] there are three methods by which periodically equal benefits could be provided under a Defined Contribution plan. However, as discussed in Attachment B, each of them would require employers to pay up to 13.5% more pension costs for female employees than for male employees[26] and would restrict the present funding, vesting and portability of the college retirement system.

II. INTERPRETATIONS UNDER THE EQUAL PAY ACT MUST SERVE AS THE BASIS FOR A UNIFORM FEDERAL POLICY ON SEX DISCRIMINATION IN COMPENSATION

EEOC's current position that it can disregard the interpretations of the Wage and Hour Administrator ignores both the express terms and legislative history of the Bennett Amendment, and the latter recognition of the force of that amendment by the judiciary.[27] Moreover, it flatly contradicts the position the EEOC adopted in its original guidelines, in which it properly recognized the Equal Pay Act and the interpretations by the Wage and Hour Administrator as the correct standard to be applied under Title VII.[28] Against this background, it can be anticipated that the courts will reject the Commission's current stand.[29]

The Wage and Hour interpretation on pension plans is likely to be upheld by the court not only because those interpretations are entitled to great deference, but because they correctly reflect the congressional intent embodied in the Equal Pay Act. As discussed more fully in Attachment D, the legislative history of the

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[22] Hearings on H.R. 12272, May 8, 1972.

[23] The unique advantages of the TIAA–CREF system are discussed in testimony of Dr. William C. Greenough (attached as Exhibit 2) which was presented at OFCC hearings on Sept. 9, 1974.

[24] *See* Exhibit 1. Those Defined Benefit options which involve *neither* equal contributions nor equal benefits violate the current positions of Wage-Hour, OFCC, HEW and EEOC.

[25] Indeed, there can be no such thing as "a unisex table." There can only be a melding of mortality experience for men and women within a given pension plan or insurance company. If the proportion of women in Plan A is higher than in Plan B, Plan A will to that extent be more expensive than Plan B.

If a particular group is composed entirely of men, the "unisex" table will be the same as a male table; if it is entirely composed of women, it will be the same as a female table, and if the group is two-thirds women and one-third men, the table will show a cost two-thirds of the way between the male and the female table. Thus, it is impossible to formulate a single "unisex" table; at most there could only be a continuum of mixtures between the male and female tables which would be more and more disadvantageous to males as the percentage of females in a plan increased. See discussion *infra* at 23–27.

[27] *See* Attachment C. The notice which invited comments on the proposed revisions to OFCC's guidelines recognized that the change in EEOC's position and the resulting conflict in administrative positions occurred, "Notwithstanding the provision in 42 U.S.C. 2000e–2(h) [the Bennett Amendment]." 38 Fed. Reg. 35337.

[28] Under the reasoning of the Supreme Court in *Udall v. Tallman*, 280 U.S. 1 (1964), it would be this original and contemporaneous interpretation of Title VII, which would be entitled to deference, not its recent revision. In *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86 (1973), the Supreme Court noted a prior inconsistent EEOC position in refusing to follow a position taken in current EEOC guidelines.

[29] It appears that, like EEOC, OFCC is required by the Bennett Amendment to defer to Wage and Hour interpretations under the Equal Pay Act. Where the Executive ". . . takes measures incompatible with the express or implied will of Congress [its] power is at its lowest ebb" and its "claim to power . . . must be scrutinized with caution. . . ." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–638 (1952) (Jackson, J., concurring). In *Contractors Ass'n of Eastern Pennsylvania* v. *Shultz*, 442 F. 2d 159, 171–172 (3d Cir. 1971), this principle was applied in the context of Title VII. While rejecting the contention that Congress had preempted the power to remedy employment discrimination, it specifically noted:

> [W]hile Congress has not prohibited Presidential action in the area of fair employment on federal or federally assisted contracts, the Executive is bound by the express prohibitions of Title VII.

Equal Pay Act clearly reflects congressional intent that it was appropriate to consider that demonstrated differences in pension costs for males and females constituted "a factor other than sex" which would justify differential treatment under the Equal Pay Act.

The Wage and Hour Administrator very clearly recognized the directive of Congress to consider such costs.[30] His subsequent interpretations with respect to pensions were consistent with that directive, as well as with the basic "equal pay" principle embodied in the legislation, the principle that overall compensation (both payments made directly to and on behalf of male and female employees) should be the same.

Obviously as the Administrator has held, pension plans which provide equal employer contributions for men and women comply with the Equal Pay Act.[31] If there had to be a choice between this approach and the alternative of equal periodic benefits, in terms of their harmony with the concept of equal pay, the equal contribution approach would necessarily prevail.

Compelling employers to incur extra costs for female employees by mandating higher pension contributions for them does more than violate principles of equality between the sexes. It also violates the underlying philosophy of the Equal Pay Act and sound compensation practice because it adopts the view that women should be paid more, not for the work they do, but because they have a unique need—they live longer. That view is the female version of the sexist position which was rejected during the Equal Pay debates of 1962. As Congresswoman Granahan stated:

> [W]age scales must reflect the skills used, rather than the personal needs of the worker for more or less pay than another worker.[32]

This is undoubtedly the correct conception of the function of compensation, and has been adopted in the Wage and Hour Administrator's Interpretative Bulletin where the use of "head of household" status as a basis for paying different wage rates was rejected:

> . . . Since the normal pay practice in the United States is to set a wage rate in accordance with the requirements of the job itself and since a "head of family" status bears no relationship to the requirements of the job or to the individual's performance on the job, the general position of the Secretary of Labor and the Administrator, is that they are not prepared to conclude that any differential allegedly based on such status is based on a "factor other than sex" within the intent of the statute.[33]

Based on the foregoing, it is submitted that the interests of a uniform federal policy on sex discrimination in compensation can only be served by HEW's adoption of proposed Section 86.46(b)(2), which is consistent with the current OFCC/Wage-Hour position.

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[30] On June 18, 1964, the Administrator quoted from the Senate Report, and declared:

> It appeared to be the intent of Congress that the question of cost factors, as they relate to the application of the equal pay provisions of the Fair Labor Standards Act, should be taken into consideration when a determination is made as to what constitutes a justifiable wage differential between employees of the opposite sex who are performing equal work within the meaning of the statute.

BNA Wage & Hour Man.. 95 : 607.

[31] Employer contributions have been the focus of the Act's application to pension plans since the first opinion letter on the subject:

> . . . we have now arrived at a determination that an employer's *contributions* to a plan providing retirement or pension benefits to his employees will be considered as "wages" within the meaning of the Equal Pay Act. (Emphasis added.)

WH-70. BNA Wage & Hour Man. 95: 656. Such contributions rather than the benefits received are also the focus of the Fair Labor Standards Act's treatment of "old age" and "retirement" plans for overtime purposes. *See* 7e(4) of the Fair Labor Standards Act of 1938, as amended. 29 U.S.C. § 207(e)(4). This treatment of pensions is relevant, not only because the Equal Pay Act is an amendment to the Fair Labor Standards Act, but also because the Administrator in his Interpretative Bulletin on the Equal Pay Act refers to § 7(e) generally in defining the meaning of wages (29 C.F.R. § 800.110) and specifically adopts the language of 7(e)(4) in his discussion under §800.113 (29 C.F.R. § 800.113). There has been a comparable focus on employer contributions under the NLRA. In *Inland Steel Co.*, 77 NLRB 1, *enforced sub nom., Inland Steel* v. *NLRB*, note 12. *supra*, the Board held that the employer's "monetary contribution to the pension plan constitutes an economic enhancement of the employee's money wage . . ." and was therefore a mandatory subject of bargaining under the Act.

[32] 108 Cong. Rec. 14763 (1962).

[33] 29 C.F.R. § 800.149. It should be noted that pension annuities are not determined on the basis of need. While the focus of criticism has been on female periodic payments under a single-life annuity, periodic benefits are also reduced where a male or female elects a joint annuity with his or her spouse. *See* Exhibit 1. While a couple clearly "needs" more than an individual, joint annuities must return a fixed accumulation over two lifetimes rather than one.

III. THE EEOC REVISED GUIDELINES ON PENSION PROGRAMS ARE UNREASONABLE

The EEOC Guidelines on pensions not only disregard the spirit and substance of the Equal Pay Act, but also confound notions of fairness and logic. As interpreted by the EEOC staff, its guidelines require equal periodic pension payments for male and female employees of the same age and credits.[34] Since females have a significantly longer life expectancy than males, this interpretation would force employers to contribute 13.5% more for their female employees than their male employees in order to provide the same installment payments under a single life annuity plan.[35] Over the course of her remaining life, the average female annuitant would receive substantially more money than her male counterpart under such a requirement.[36]

In addition, funding a benefit plan to provide equal periodic benefits to men and women under single life annuities would result in greater periodic payments to women if any other benefit option is chosen, unless the excess funds are divested from the women electing the other options.[37]

The use of actuarial tables based on age and sex avoids such inequities between groups of annuitants. Just as it would be unreasonable to require equal periodic benefits to two pensioners of the same sex when one is starting to receive payments at 60 and the other at 64, so it would be unreasonable to require equal periodic benefits to a male and a female both age 65, since the female has about a four-year greater life expectancy.

The recognition of sex as a factor affecting life expectancy in the payment of benefits thus is an equitable practice, totally unlike the common group presumptions or sex-stereotypes which have been condemned as a basis for employment decisions. Women have often been disadvantaged by assumptions that certain characteristics are shared by all women.[38] For example, an employer may refuse to consider women for a position requiring the lifting of more than 30 pounds on the premise that women cannot lift such weight. Such a policy suffers from two logical defects: the premise, itself (1) may be based on misinformation or on notions of paternalism; and (2) is unnecassary, since the ability or trait can be individually ascertained by testing. By contrast, unquestionably reliable data establishes the fact of greater female life expectancy.[39] Moreover, there is no alternative which would permit individual testing.[40]

The basic difference between the present question and those typically confronted in employment discrimination cases was recognized in a recent opinion letter issued by the Attorney General of Washington.[41] The opinion concluded that a state statute banning sex discrimination in insurance transactions did not prohibit the sale of insurance policies which established different rates for male and females based on the greater female life expectancy. It noted:

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[34] This interpretation is questionable as applied to annuity or pension payments. Since the function of an annuity or pension is to provide compensation throughout the period specified (*e.g.*, life expectancy), it seems more accurate to judge equality in terms of the total amount paid or expected to be paid. This is precisely the equality achieved by the use of sex-based actuarial tables in defined contribution plans. Since the same size fund has been accumulated for both men and women, under such plans members of each sex will have been paid actuarially equivalent amounts if they die at the expected age.

[35] The fact that female annuitants have a demonstrably greater life expectancy than male annuitants regardless of whether they have been housewives or employees is indisputable, as is discussed in detail in Attachment A.

The Supreme Court has recognized that the life expectancy advantage of women over men is so well settled that it is a proper subject for judicial notice. *Reed* v. *Reed*, 404 U.S. 71, 75 (1971).

[36] Given the strength of the statistical showing that males have a shorter life expectancy than females, the practice of paying equal periodic pension installments may well run afoul of the Supreme Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431, that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." This was precisely the conclusion of the Attorney General of Washington in a recent opinion letter (discussed at pp. 20–21, *infra*) where he cites *Griggs* for the proposition that *"equality of treatment may be denied as much by equal application of a single standard to persons unequally situated as by application of unequal standards to persons equally situated."* (Emphasis in original.) Certainly, ignoring life expectancy differences seems contrary to the requirement under both the EEOC and the OFCC Testing Guidelines that selection standards include different qualification levels for ethnic and sex groups where statistical evidence demonstrates that those different qualification levels yield equal average job performance by members of the respective groups.

[37] *See* discussion at p. 11, note 24 and text, *supra*.

[38] *See, e.g.*, Rosenfeld v. Southern Pacific Co., 444 F. 2d 1219 (9th Cir. 1971); Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (7th Cir. 1969); Weeks v. Southern Bell Tel. & Tel. Co., 408 F. 2d 228 (5th Cir. 1969).

[39] *See* note 35, *supra*, and detailed discussion in Attachment A.

[40] See Attachment A, pp. 2–3.

[41] AGO 1973, No. 21 (Oct. 11, 1973).

> The problem presented . . . has few parallels in the heretofore decided civil rights cases because ordinarily civil rights, like constitutional rights, belong to individual persons and not to classes of persons. Generalities about the class of persons to which the complainant belongs are usually immaterial to his or her rights under a civil rights statute, even if these generalities are true. As the court said in *Diaz* v. *Pan American World Airlines*, 442 F.2d 385 (5th Cir. 1971), cert. den. 404 U.S. 950, 30 L. ed. 2d 267, 92 S.Ct. 275 (1971):
>
> > ". . . Pan Am cannot exclude *all* males simple because *most* males may not perform adequately [as stewards-stewardesses]."
>
> Insurance, however, is something which by its very nature applies to classes of persons. Its function is to reduce *individual* risk by lumping persons together in *classes*, all members then sharing the cost of the total risk of the class. A realistic application of a civil rights statute to insurance must, therefore, deal with the class characteristics of the insurance industry, and since most of the decided cases dealing with civil rights take an "individualistic" approach, they are thus of little assistance in resolving the present question.[42]

It is equally important to recognize that the alternative to grouping by sex suggested by the EEOC guidelines is not individual testing. If the sex of annuitants must be ignored in determining benefit levels, insurers will be forced to make another assumption about a group of people (*i.e.*, men and women of same age have equal life expectancies) which is demonstrably erroneous.

The "equity" of TIAA–CREF's use of actuarially equal benefits has been recognized by two state agencies which concluded that pension benefits which recognize the difference in male and female life expectancy do not discriminate on the basis of sex. In a May 22, 1973, Opinion Letter, the Attorney General of Oregon concluded that actuarially equal benefits provided under that State's Public Employees Retirement System did not result in unlawful discrimination against women, even though their periodic benefits would be lower than those of a male of the same age.[43] In *Coleman* v. *New York University Teachers Insurance and Annuity Association, College Retirement Equities Fund* (Case No. Ia–CSF–2136–73), an NYU parofessor charged, *inter alia*, that her school's TIAA–CREF pension program discriminated against women, in violation of the New York Human Rights Law, by providing lower monthly pension benefits for women than for men. Following an ivnestigation, a Regional Director of the State Human Rights Division found that there was no probable cause to believe the respondents had violated the law. He concluded that claimants' "retirement benefits were based on reasonable actuarial grounds."[44]

IV. MANDATING "UNISEX" PENSION PROGRAMS COULD HAVE A SERIOUS ADVERSE IMPACT ON THE COLLEGE RETIREMENT SYSTEM

Although the use of sex-based actuarial tables has been recognized and approved by the courts,[45] the third alternative under consideration by HEW would require "the use of premium or rate tables which do not differentiate on the basis of sex. . . ." While "unisex" tables are often proposed as a solution to the problem created by the difference in male and female life expectancy, TIAA-CREF submits that this is a totally unworkable proposal. Since the sex of annuitants must be recognized to permit reasonably accurate cost calculations, there is no such thing as "a unisex table." Moreover, while "unisex" benefits can be provided, they would have serious consequences for insurance companies, employers, and pension plan participants.

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[42] A similar distinction was recently recognized by the Supreme Court in *Geduldig* v. *Aiello*, 94 S. Ct. 2485 (1974), where it held that the exclusion of benefits for normal pregnancy from a state-operated disability insurance did not discriminate on the basis of sex. The Court distinguished its earlier holdings that certain sex-based group presumptions violated the equal protection clause (*Reed* v. *Reed*, 404 U.S. 71 (1971) and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973)), stating:

> There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable *group* or *class* in terms of the aggregate risk protection derived by that *group* or *class* from the program. 94 S. Ct. at 2492. (Emphasis added.)

[43] It should be noted that the Oregon Fair Employment Practices Act (ORS § 659.010, *et seq.*) exempts from its prohibitions ". . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ." The Attorney General concluded that the State system was "bona fide" and the analysis of his Opinion Letter dealt primarily with Title VII. *See also* Opinion Letter of the Attorney General of Washington, *supra*, note 41 and text.

[44] In *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 n. 2 (1973), the Supreme Court considered interpretations of comparable state FEP laws relevant, though not controlling, in construing Title VII. Moreover, Section 706(b) of Title VII requires EEOC to "accord substantial weight" to "final findings and orders" under state FEP law.

[45] See, particularly, *King County Employees' Ass'n* v. *State Employees' Retire. Bd.*, 336 P. 2d 387, 392 (Wash. 1959), dealing with the use of these tables in determining male and female annuities under a pension plan, and 22 Am. Jur. 2d § 354 generally, for a listing of cases in which these tables were endorsed for calculating damages in personal injury actions.

It is totally unrealistic to attempt to eliminate sex from actuarial calculations, since sex, like age, is a proven and important determinant of mortality rates.[66] If pension programs were told that they could not consider the sex of individuals in predicting longevity, a substantial margin of error would be built into every actuarial calculation, since men and women of the same age have survival rates which are markedly different. Thus, so-called "unisex" tables must be benefit tables, derived from the separate male and female tables currently in use, which establish benefit levels between the actual male and female levels. The point at which the "unisex" benefit levels would be established for a given group would depend on its sex composition—the more women in a given group, the lower the level of periodic benefits.[67]

Since the "unisex" level of benefits must vary with the sex composition of the covered group, there can be no such thing as "a unisex table." Attempting to establish a single unisex table based on the proportions of men and women in the general population or in the national work force would threaten the solvency of many insurance companies. Any company with a larger percentage of women in its pension programs than the national sample would have costs which were higher than those recognized in the standard table. Use of the standard unisex table would put such a company out of business.

Even where "unisex" tables are accurately constructed based on the proportions of men and women actually in the covered group, the forces of competition could have a disastrous impact on existing pension programs. If a single company like TIAA-CREF, because of its specialization in the pension programs of educational institutions, were required to adopt "unisex" tables by the Title IX regulations, it would be placed at a severe competitive disadvantage. Companies continuing to utilize separate male and female tables could substantially undersell TIAA-CREF for male annuities. Gradually, TIAA-CREF would become an all-female program, and its "unisex" table would reflect only female mortality. At that point benefits would be paid at the present female level—no one would gain.

This result would be only slightly moderated if all companies selling to educational institutions used "unisex" tables. Individual companies could still specialize in all-male or predominately male institutions so that their "unisex" rates would more nearly reflect male levels. Male-specialty companies would attract predominately male institutions thereby increasing the costs and lowering the levels of benefits for the remaining pension plans.

Apart from the competition among insurance companies, a requirement that educational institutions provide "unisex" pensions would place considerable pressure on institutions with high proportions of male employees to self-insure.[68] The "unisex" costs of such institutions would be lower than the rates charged by any broadly-based insurance company. As in the situation described above, this would remove males from insured plans, raising their costs and lowering their benefit levels.

The requirement of "unisex" pension programs could have an even more severe impact on the individual male or female participant in the college retirement program. The competitive forces and the pressure to self-insure, described above, could be expected to fractionalize the existing college system. Either of these outcomes would deprive participants of a broadly portable pension program, a particularly desirable feature in the area of higher education.

Requiring "unisex" pensions would also raise legal and equitable problems regarding the pension expectations of individual participants. Ignoring the difference in male and female life expectancy will not make it go away. Under "unisex" men would subsidize the pension benefits of women by having a part of the contributions currently made in their behalf diverted to support "unisex" benefit levels. The legal problems would be compounded if "unisex" benefits were required with respect to prior service. This would be particularly true for the college retirement system since TIAA–CREF pensions are actually individual contracts with individual participants which vest them with ownership of the contributions which have been made in their behalf.[49]

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[66] The needed precision provided by separate male and female mortality tables was recognized by the Internal Revenue Service in 1971, when it switched from "unisex" to "male-female" tables in computing life-interests under Section 2031 of the Internal Revenue Code (see Section 20.2031 of the Estate Tax Regulations). Regulations under other Sections of the Code which require actuarial calculations (*e.g.*, Sections 72 and 664) have always considered the effects of sex on life expectancy.

[67] *See supra* note 25.

[68] Indeed, most defined benefit plans in use in private industry are "trusteed" plans which do not involve an insurance company.

V. THE COURTS MUST ULTIMATELY RESOLVE THE CONFLICT IN ADMINISTRATIVE INTERPRETATIONS

It is apparent that the conflict in interpretations regarding sex discrimination in fringe benefit programs between the current OFCC/Wage-Hour position and Section 86.46(b)(2) on the one hand, and the EEOC position or mandatory "unisex" on the other, must ultimately be resolved in the courts. Indeed, the announcement which solicited comments on the proposed revisions to the OFCC guidelines noted: "The OFCC, however, recognizes the need to be guided by pertinent judicial decisions. . . ." 38 Fed. Reg. 35337. A number of cases are already pending which involve the legality of the three alternatives under consideration by HEW.[50]

HEW should recognize that adoption of the EEOC position or mandatory "unisex" would place considerable pressure on educational institutions which receive federal financial assistance. Such institutions would be required to choose between a potential termination of federal funding and costly changes to their retirement programs. If the courts ultimately decide that the recognition of differences in male and female life expectancy does not constitute sex discrimination, many institutions would be unable to undo the result of changes made to comply with HEW's position. Accordingly, TIAA–CREF submits that, while this question is the subject of pending litigation, HEW should refrain from taking any action which would require radical and costly changes to retirement programs.

CONCLUSION

The present interpretations of Wage-Hour, OFCC, and Section 86.46(b)(2) allow colleges and universities important flexibility in determining how they will fund a pension program. They may choose a Defined Contribution pension program which involves equal employer contributions and actuarially equal benefits and which results in substantial advantages in retirement security.[51] This choice not to incur extra costs with respect to women is not discriminatory, but is based on bona fide differences between the sexes. Recognizing these differences is not only reasonable in order to avoid discrimination against males, but is consistent with authoritative and controlling interpretations under the Equal Pay Act. It can therefore be expected that the courts will ultimately resolve the administrative conflict by rejecting the current EEOC position. Therefore, TIAA–CREF urges the adoption of proposed Section 86.46(b)(2).

ATTACHMENT A

THE RECOGNITION OF SEX-BASED DIFFERENCES IN LIFE EXPECTANCY IS INDISPUTABLE

At the heart of EEOC's rejection of the Wage-Hour Administrator's authorization of benefit programs based on equal contributions for the sexes is a decision to ignore or dispute mortality studies based on sex despite the fact that both experience and research leave no doubt that those studies are correct.

Females do live longer on the average than males, as scientists both in this country and throughout the world have statistically demonstrated.[1] The difference cannot be explained by the absence of work stresses for many women, since there is data to show that there is no reduction in the female life-expectancy advantage for career women as opposed housewives.[7] It is clear that women enjoy an innate biological advantage over men in terms of life expectancy. For example, a woman at the likely retirement age of 65 has a life expectancy that is four years greater than that of a man at the same age.

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[49] *See* discussion at p. 10, *supra*.

[50] *See*, *e.g.*, Robertson v. Rielly, No. 4098 Vanderburgh Circuit Court, Indiana (filed Jan. 2, 1974); Melani v. The Board of Higher Education of the City of New York, No. 73 Civ. 5434 (S.D.N.Y., filed Dec. 20, 1973); Manhart v. City of Los Angeles, Department of Water and Power, Civ. No. 73–2272–HP (C.D. Cal., filed July 22, 1974); and Spirt v. Teachers Insurance and Annuity Association and College Retirement Equities Fund, No. 74 Civ. 1674 (S.D.N.Y., filed April 15, 1974).

[51] *See* discussion at pp. 9–11, *supra*, and in Exhibit 2.

[1] Kallman and Jarvik, "Individual Differences in Constitution and Genetic Background," Handbook of Aging and the Individual, 1959, pp. 216–263; Madigan and Vance, "Differential Sex Mortality: A Research Design," Social Forces, 35 (1957), pp. 183–199; "The Change in Mortality Trend in the United States," Vital and Health Statistics, Public Health Service Pub. No. 1000, Series 3, No. 1, Public Health Service, Washington, 1964; "Mortality," 1968, Vital Statistics of the United States, Vol. II, Parts A and B, Public

Despite suggestions to the contrary, aside from age, no other factors would provide a more accurate prediction of life expectancy:

Race or Color.—Population statistics show generally higher death rates for blacks than for whites. But demographers point out that the difference cannot be explained satisfactorily on biologic or genetic grounds, or the color of one's skin. Instead, economic and environmental differences are cited as the reason.[8] For persons in similar economic and environmental circumstances, there is no evidence of differential mortality by race or color. Annuity mortality tables are not based on general population statistics, but on statistics of annuitants. Annuitants are generally in similar economic and environmental circumstances, and there is no basis for distinguishing between black and white annuitants.

Health or Personal Habits.—Insurance companies could not rely on health or personal habits, such as drinking or smoking, to determine life expectancy for two fundamental reasons. First, there is no way to quantify the effect of such criteria on life expectancy. Second, these conditions are subject to change; there is no guarantee, nor ought there be, that poor health or deleterious personal habits will be maintained.

Heredity.—There is evidence that heredity has some effect on mortality. However, as is the case of health or personal habits, there is no way to accurately quantify its effect on life expectancy.

ATTACHMENT B

OPTIONS FOR PROVIDING EQUAL PERIODIC BENEFITS AND THEIR EFFECTS ON THE COLLEGE RETIREMENT SYSTEM

Apart from changing to a Defined Benefit plan,[1] or adopting a "unisex" approach to calculating annuities,[2] there are three methods by which the college retirement system could provide equal periodic benefits for men and women. However, each method would pose serious problems for features of the present system which are important to the academic community:

Increased Contributions for Women.—Like the Defined Benefit plans, greater contributions could be required with respect to female participants. However, if the concept of fully vested, individual accumulations is retained, it would be impossible to provide more than a single benefit option which was equal for men and women.[3]

"Topping up."—In order to maintain the present range of benefit options, women's accumulations could be supplemented at the time of retirement. The

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Health Service, Washington, 1971; William Petersen, Population, 1971; Edward G. Stockwell, Population and People, 1970; United Nations, Demographic Yearbook, 1970; World Health Organization, Programmes of Analysis of Mortality Trends and Levels, Technical Report Series No. 440, 1970; World Health Statistics Report, Vol. 25, No. 5, 1972.

See Reed v. Reed, *supra*, note 35.

[7] Duncan, "TIAA Female Mortality Experience 1965–1970," Teachers Insurance and Annuity Association, 1972.

Female beneficiaries of the Railroad Retirement Board have a greater life expectancy between ages 60–85 than the wives of male beneficiaries. "RRB Quarterly Review," January–March (1973).

The inherent female life expectancy advantage has also been demonstrated in a mortality study of monks and nuns who were teachers and who had the same life styles. Madigan, "Are Sex Mortality Differentials Biologically Caused?' Milbank Memorial Fund Quarterly, 35, 1957, pp. 203–223.

To the same effect see: Bayo and Glanz, "Mortality Experiences of Workers Entitled to Old-Age Benefits under OASDI 1941–1961," U.S. Department of Health, Education and Welfare, Social Security Administration, Division of the Actuary, Actuarial Study No. 60, August, 1965.

[8] W. Petersen, Population (2d ed. 1971).

[1] As discussed above, Defined Contribution plans enjoy substantial advantages over the typical Defined Benefit plan, which are particularly important to the college retirement system. *See* pp. 9–11, *supra*, and Exhibit 2.

[2] *See* pp. 11–12, note 25, and pp. 23–27, *supra*.

[3] If an employer paid the differential necessary to equalize periodic benefits for a woman 65 years old under a straight, single life annuity (13.5%), under all other options, which are computed in relation to the single life annuity, a female would receive substantially greater *periodic* benefits—up to a full 13.5% greater monthly payment under a joint two-thirds to survivor option. *See* p. 11, note 24, *supra*.

amount to be added would be determined by the option selected by the individual woman.[4] This approach presents considerable problems in determining who must provide the "topping up" funds.[5] May the cost be charged back against each college which has employed a currently retiring woman, or must the burden be borne solely by her last employer? These substantial all-at-once costs may cause the institution to prefer one of the other alternatives and could reduce opportunities for females to transfer among participating institutions.

Group Contracts.—Under a group annuity contract owned by individual institutions, TIAA could make the monthly rate of pay-out for women equal to that for men under all benefit options, through blending techniques. However, this would require the abandonment of individually owned, portable annuity contracts and would result in part of the cost of benefits for women being borne by the male employees.

ATTACHMENT C

TITLE VII REQUIRES DEFERENCE TO THE EQUAL PAY ACT

Administrative consistency is a worthwhile and important objective for all the federal agencies which enforce equal employment opportunity programs, an objective recently reaffirmed by Congress when it created the Equal Employment Opportunity Coordinating Council in amending Title VII in 1972.[1] In the area of sex differentials in compensation, Congress has provided that the Equal Pay Act of 1963 shall be the uniform federal standard. Section 703(h) of Title VII of the Civil Rights Act of 1964, known as the Bennett Amendment states:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended. . . .[2]

The clear intent of Congress to apply equal pay standards to Title VII has been judicially confirmed. In *Shultz* v. *Wheaton Glass Co.*,[3] the Third Circuit supported its resolution of an Equal Pay Act suit with a reference to the Bennett Amendment. It recognized that because of the amendment the two statutes were in *pari materia*, and that the Equal Pay Act standards would apply to equal pay claims brought under Title VII.[4] The Tenth Circuit came to the same conclusion in *Ammons* v. *Zia Co.*,[5] in considering a claim of sex discrimination in compensation brought under Title VII. The *Ammons* Court specifically held that Equal Pay Act standards must be used to determine whether a plaintiff has established a prima facie case, and that a defendant must rebut such a prime facie showing by establishing one of the defenses recognized by the Equal Pay Act.

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[4] *E.g.*, 13.5% where a woman of 65 elects a single life annuity, 9% where she adds a ten-year guarantee of payments.

[5] This would be especially true if supplementation is required for accumulations vested for females, prior to a definitive legal requirement of equal periodic benefits.

[1] Section 715 of Title VII.

> It is critical that employers be in a position to rely on a coordinate government position on all matters, not the least of which is equal employment opportunity. It is just as vital to employees who feel that they have been subjected to discriminatory employment practices that the relevant agencies of government coordinate their efforts. It is also clear that the government's effectiveness can be improved significantly. I believe the amendment . . . will help achieve these objectives."

118 Cong. Rec. 1399 (1972) (remarks of Senator Randolph).

[2] Section 703(h) of Title VII. Senator Bennett's suggestion that his amendment "discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act," 111 Cong. Rec. 13359 (1965), has been criticized because it would limit the application of Title VII to the narrower coverage of the Equal Pay Act. However, even these critics recognized that the Bennett Amendment should be construed to "apply the standards of the Equal Pay Act . . . to cases involving discrimination in the amount of compensation which arise under Title VII." Memorandum of the Citizens Advisory Committee on the Status of Women, July 28, 1965. To the same effect, see statement of Senator Clark, 110 Cong. Rec. 7217 (1964), Murray and Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 254–255 (1965); Berger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 Valpariso L. Rev. 326, 371 (1971).

[3] 421 F. 2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

[4] The court's statement that, "the Equal Pay Act may not be construed in a manner which by virtue of § 703(h) would undermine the Civil Rights Act," (*id.* at 266) should not be read as suggesting that the Bennett Amendment was somehow intended to expand Equal Pay Act concepts. Such a construction would be contrary to both the letter and the history of the amendment. Similar arguments have been rejected not only by the Third Circuit (*Hodgson* v. *Robert Hall Clothes*, 473 F. 2d 589, 596 (1973)), but also by another court of appeals (*Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 727 (5th Cir. (1970)).

[5] 448 F. 2d 117 (10th Cir. 1971). Judge Aldisert, who authored the opinion, was sitting by designation from the Third Circuit, and had been a member of the panel which decided *Wheaton*.

It is not, however, merely the language of the Equal Pay Act, but also the authoritative interpretations of that Act offered by the Wage and Hour Administrator that must be applied under Title VII. As the agency charged with administration and enforcement of the Equal Pay Act, its decisions are entitled to "great deference."[6] Indeed, one commentator has observed:

> It might be argued, that the Bennett Amendment is not directed at conflicts between the two statutes so much as at conflict of interpretations between the Wage-Hour Administrator and the Equal Employment Opportunity Commission.[7]

ATTACHMENT D

LEGISLATIVE HISTORY ON TREATMENT OF SEX BASED UPON COST DIFFERENTIALS UNDER THE EQUAL PAY ACT

The original subcommittee versions of the Equal Pay Act permitted an employer to maintain a wage differntial between employees of the opposite sex in only two circumstances: When it was based either on a merit system or a seniority system.[1] The limited nature of these exceptions was a focus of industry criticism at the Senate and House hearings held between mid-March and mid-April, 1963.[2] A significant and repeated argument raised by the critics[3] was that it was more costly to employ women than men and that a woman and man doing the same work should not be paid the same if there were expenses incurred in employing a woman that were not suffered in employing a man.[4] One example of extra costs was cited frequently:[5] the higher insurance premiums paid on behalf of women for annuity plans.

As a result of the comments and testimony heard, the bill as reported out of committee in both houses of Congress included a new provision, excepting from the requirements of equal pay "a differential based on any other factor other than sex."[6] The Senate in its Report specifically noted the concern expressed during the hearings about the greater expense involved in hiring females:

> Some employers stated that the cost of their pension . . . plans were higher for women than men . . . because of the longer life span of women in pension benefits.

The Report concluded by charging the Labor Department to consider such costs in determining whether an equal pay violation has occurred:

> It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs of both men and women, an employer will be economically penalized by the elimination of a wage differential, the Secretary can permit an exception similar to those he can permit for a bona fide seniority system or other exception mentioned above.[7]

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[6] Griggs v. Duke Power Co., 401 U.S. 424, 434–435 (1971); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Brennan v. City Stores, Inc., 479 F. 2d 235 (5th Cir. 1973).

[7] Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 Brooklyn L. Rev. 62, 76 n. 26 (1964).

[1] Sec. 4a of H.R. 3861 as printed in Hearings before the Special Subcommittee on Labor of the House of Representatives (hereinafter Hearings-House), p. 3 and Sec. 4 of S. 882 as printed in Hearings before the Subcommittee on Labor of the United States Senate (hereinafter Hearings-Senate), p. 2.

[2] The hearings before the House of Representatives were held on March 15, 25, 26 and 27, 1963. Senate hearings took place April 2, 3 and 16, 1963.

[3] Six of the 9 witnesses who criticized the bill before the House Subcommittee and 5 of the 8 witnesses who criticized the bill before the Senate Subcommittee made this particular objection. *See* Hearings-House, pp. 139, 251, 192, 200; Hearings-Senate, pp. 130, 178, and note 5, *infra*.

[4] This contention was not disputed by supporters of the measure, one of whom put herself on record as approving a recognition of cost differentials.

> Mr. Griffin: "At another point in your statement you referred to the fact that some people have raised the question of whether or not there are extra costs involved in employing women in some situations . . . there is the possible additional cost involved in health, welfare, and insurance programs. And then, I was interested in your next statement where you said that, as a defense to these concerns, the proponents of the bill would be willing to go along with language which would recognize this difference in cost if it in fact existed and could be ascertained and proved. . . ."
>
> Miss Sarah Jane Cunningham (National Legislation Chairman, National Federation of Business & Professional Women's Clubs, Inc.): "Yes, this is correct, Mr. Griffin."

Hearings-House, p. 87, March 15, 1963.

[5] *See* Hearings-House, pp. 97, 103, 158, 185 and Hearings-Senate, pp. 141–142.

[6] H.R. 6060 as quoted in H.R. Rep. No. 309, 88th Cong., 1st Sess., 7 (1963); S. 1409 as quoted in S. Rep. No. 176, 88th Cong., 1st Sess., 6 (1963).

[7] S. Rep. No. 176, note 6, *supra*, at 6.

EXHIBIT 1

COMPARISON OF VARIOUS INCOME OPTIONS—MONTHLY ANNUITY BENEFITS STARTING AT AGE 65

	Equal accumulations achieving actuarially equal benefits		Accumulations 13.5 percent larger for women to achieve same monthly single life annuity	
	Male (1)	Female (2)	Male (3)	Female (4)
Accumulation at age 65	$100,000	$100,000	$100,000	$113,500
For single retirees:				
One-life options:				
Single life annuity	892	785	892	892
Life income with 10-yr minimum	835	763	835	866
Life income with 20-yr minimum	731	708	731	804
	If husband was employee	If wife was employee	If husband was employee	If wife was employee
For retired couples:				
Joint-life options with 10-yr minimum:				
⅔ benefit to survivor[1]	790	790	790	897
Full benefit to survivor[1]	716	716	716	813

[1] Assuming both spouses are the same age.

Note: Figures are based on TIAA's present rates, taking into consideration dividends on the current scale.

CHATHAM, N.J., *June 5, 1975.*

I hope your committee will recommend the elimination of the proposed HEW ruling for compulsory coed physical education classes and for more restrictions on the way money will be turned over to female athletic teams. Ford should have thrown these provisions out!

WILLIAM E. BOUCHER.

CARLILE PATCHEN MURPHY & ALLISON,
Columbus, Ohio, June 19, 1975.

Congressman JAMES G. O'HARA,
Chairman, House Subcommittee on Education,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: As counsel for the National Council of Mortar Board, Inc., we are hereby submitting our comments relative to Subpart D of Section 86.31 of the Proposed Regulations in implementation of Congressional Enactment of Title IX.

Your specific attention is directed to the fact that we believe the Subpart to be inconsistent with the Congressional Enactment itself and therefore inappropriate and a nullity.

The arguments on behalf of this position are set forth in the enclosed comments. Thank you for your attention to this matter.

Respectfully yours,

HUNTINGTON CARLILE.

Enclosure.

TO THE SUBCOMMITTEE ON EDUCATION OF THE HOUSE OF REPRESENTATIVES

COMMENTS OF MORTAR BOARD, INC., RELATIVE TO THE PROPOSAL OF THE SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE TO ADD PART 86 TO TITLE 45 OF THE CODE OF FEDERAL REGULATIONS

Subpart D of Section 86.31 is an effort on the part of its drafters to create balance and effect progress in the continuing struggle for equality of rights and opportunities by classes of citizens denied such rights and opportunities. However, in the justifiable anxiety of its proponents, the Subpart is too broad where it applies to private organizations of colleges and universities, and will, if implemented, destroy the effectiveness of groups whose purpose is to promote recognition and equality for women whose rights have been and still are being abridged.

At the outset it is conceded by all parties and stated by the Secretary that the purpose of Part 86, Nondiscrimination on the Basis of Sex Under Federally Assisted Education Programs and Activities, "is to effectuate Title IX of the Education Amendments of 1972" (Public Law 92–318, 92nd Congress, S. 659, June 23, 1972, 20 U.S.C. #1681 et seq.) It is an elementary principle of law that administrative rules may not exceed the authority of Congressional action to which the rules purport to relate. The question is immediately presented as to whether Subpart D, Section 86.31, as it purports to relate to private campus organizations, falls within the authority granted the Secretary.

Whereas Title IX seeks to prohibit denial of equal benefits of educational programs and activities, nevertheless it contains an important exception. The Act exempts admissions practices and policies of institutions of higher education which are other than public institutions. The Congress expressly excluded private colleges and universities. A private institution may deny men or women entry under any circumstances and for whatever reason, enabling women's colleges to create their own unique educational opportunities.

Congress may well have taken into account the thesis held by many educators and social commentators that some women as the "minority sex" may learn better, develop and strengthen their own potential better, and engage in programs leading toward their own fulfillment more fully in an atmosphere in which men are expressly excluded. There is recognition that historical and traditional domination by men has created the need for places wherein a woman's potential may be better realized inside organizations exclusively limited to women. Whatever may have motivated it, Congress clearly recognized the principle of admissions exclusivity in the enactment of Title IX, and has permitted private institutions of higher education to be limited to one sex.

In view of the fact that Title IX expressly permits limitations in admissions on the basis of sex in non-public institutions, the analogy is inescapable that the act itself is not meant to apply to private organizations which may exist upon or in connection with either a private or public institution. A well enunciated rule of statutory construction provides that the smaller right or prohibition, as the case may be, is by implication included within a larger action by a legislative body. It is simply not logical to believe that the legislative intent of Title IX, which expressly exempts the whole of any private institution of higher education in its admissions does not apply to private programs connected with educational institutions. The Secretary of the Department of Health, Education and Welfare in attempting to implement Title IX would, in Subpart D, Section 86.31, Subparagraph (b)(7) exceed legislative intent and would therefore exceed the authority granted him under the provisions of the Congressional enactment. Subparagraph (b)(7), if finally promulgated, would be an act of administrative legislation, a fatal defect, which alone should stay the hand of the secretary.

These comments, prepared and submitted this 19th day of June, 1975, at the direction of the National Council of Mortar Board, Inc.

CARLILE, PATCHEN, MURPHY & ALLISON,
By HUNTINGTON CARLILE, *Counsel.*

UNITED STATES CATHOLIC CONFERENCE,
OFFICE OF GOVERNMENT LIAISON,
Washington, D.C., June 30, 1975.

HON. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the United States Catholic Conference, I would like to express our views on certain aspects of the recently promulgated Regulation to implement Title IX of the Education Amendments of 1972 (P.L. 92–318).

This Regulation provides for an exemption for educational institutions which are controlled by a religious organization "to the extent application of this part would not be consistent with the religious tenets of such organization." (Sec. 86.12) It is our understanding that this exemption applies to any requirements of this Regulation which are inconsistent with the religious tenets of a religious organization that operates an educational institution. We feel that this was clearly the intent of Congress in creating this exemption and that there should be no ambiguity about this in either the Regulation or in any new amendments to Title IX which the Congress might enact.

There are two situations which this Regulation does not address directly and which should be clarified by any new legislative amendments. One involves the appointment of teachers or administrators within an educational institution who are either clergy or members of a religious order. If the operation of an educational institution is part of the religious mission or apostolate of a religious order, preference in personnel appointments is often given to members of that religious order. In such a case, this preference is based on membership or non-membership in that religious order and not on the sex of the persons involved. However, since all religious orders are comprised exclusively of either males or females, one might argue, for example, that the preference for a female member of a religious order rather than a male layman for a school principalship would in fact constitute sexual discrimination.

In a situation such as that described above, it would frustrate the fulfillment of the religious apostolate of the members of the religious order if the school was required to place a man in charge of the school which they are operating. This is not a proprietary consideration but one which directly relates to the maintenance of religious orders and their religious mission.

The second situation concerns the Regulation as it affects vocational education schools. Our vocational schools receive little assistance, if any, under current vocational education federal assistance laws. Their situation is aggravated by the fact that the few vocational schools maintained by the Church, are in some instances operated by religious orders, whose Rule requires that they confine their education to a particular sex. In short, religious orders, by dedication, education and religious tradition, have limited their activities to a particular sex. Since these schools differ substantially from the Congressional concept of a vocational education school, we submit that they were never intended to be included in Title IX. Accordingly, consideration should be given to administrative treatment directed to their unique position.

Enclosed you will find a copy of our comments on the proposed Regulation dated October 11, 1974. This will provide you with a more detailed analysis of the constitutional issues involved in this matter.

We are submitting these views to be incorporated in the record of the Hearings of your Subcommittee and request that you and the members of your Subcommittee give them full consideration in any further legislative action.

Sincerely,

James L. Robinson,
Director.

Enclosure.

United States Catholic Conference,
Office of General Counsel,
Washington, D.C., October 11, 1974.

The Director of the Office of Civil Rights,
Department of Health, Education, and Welfare,
Washington, D.C.

Dear Mr. Holmes: On June 20, 1974, the Office of Civil Rights of the Department of Health, Education, and Welfare published Notice of Rule Making to effectuate Title IX of the Educational Amendments of 1972 to eliminate discrimination on the basis of sex in any education program or activity receiving federal financial assistance (Federal Register, Volume 39, No. 120, Thursday, June 20, 1974).

On behalf of the United States Catholic Conference, we wish to offer the following observations and comments.

The purpose of the legislation is understandable and commendable. However, the implementation of the law impinges on specific areas of religious freedom and, additionally, goes substantially beyond the intention of Congress, especially in its application to the internal operation of church-related schools.

Section 86.12 of Subpart C appropriately provides that this part does not apply to an educational institution which is controlled by a religious organization to the extent that application of the part "would be inconsistent with the religious tenets of the organization." In order to take advantage of this statutory exemption, the Notice of Rule Making provides that the educational institution shall submit in writing to the Director statements of the religious tenets under which the exemption is claimed, and any other information which might aid the Director *"in determining whether the institution qualifies for such exemption."* (Emphasis supplied.)

As we interpret this regulation, the Director would have the authority to examine the religious tenets of the organization and the discretion to determine whether such religious tenets warrant the application of the statutory exemption. We submit that this procedure is inconsistent with repeated pronouncements of the Supreme Court of the United States, especially since 1970. We will note cite all of the relevant cases, but limit our reference to *Walz* v. *Commissioner*, 397 U.S. 664 (1970), and *Lemon* v. *Kurtzman*, 403 U.S. 662 (1971), where the Supreme Court of the United States stated categorically that the First Amendment mandates neutrality between church and state, and that, in order to preserve this neutrality, the state must refrain from a *surveillance* of religion or religious activities. This judicial mandate against entanglement is totally ignored in the proposed regulation.

A similar situation arose in the development of regulations involving the Selective Service Act which provided for the exemption of seminarians attending "recognized theological or divinity schools." Originally, the Selective Service System requested documentation of religious tenets. Finally, after reviewing its policy with religious groups, it agreed to accept certification of the status of the seminary. We urge that Section 86.12 be amended to delete the reference to the submission of documents containing the religious tenets and to substitute therefor a certification procedure. This will avoid serious constitutional issues and at the same time provide a workable administrative procedure.

Moreover, it would be a particularly appropriate procedure for our seminaries, both with respect to the question of admissions and employment policies. Seminaries have been a part of the training of the Catholic priesthood for centuries and the controlling procedures of which are rooted in religious tenets and religious tradition with respect to the training of priests, supplemented by diocesan regulations and other rules concerning the training of seminarians. The training of priests is at the very heart of "Free Exercise of Religion" and Government surveillance is especially proscribed. Under the above circumstances, we submit that the certificate procedures would be particularly appropriate.

The second important principle which we wish to emphasize is that a church-related institution, especially at the elementary and secondary level, has a right to maintain internal discipline to the extent that it *reflects religious tenets and beliefs*. The Supreme Court of the United States in *Lemon* v. *Kurtzman*, *supra*, characterized the parochial school as "an integral part of the religious mission of the Catholic Church." On the basis of that asserted proposition, we submit that internal discipline imposed on a parochial school must be consistent with the mission of the Church and its basic tenets.

This proposition is especially applicable to every subparagraph of the ruling which would prevent the school authorities from taking appropriate action where a student, a teacher, or an applicant for the teaching profession is involved in abortion procedures or pregnancy outside of marriage. Both of these situations have a direct relationship to internal discipline which reflects the teaching of the Catholic Church. We cannot teach our children one thing and implicitly approve that which is diametrically opposed to our basic religious tenets.

In addition to this constitutional position, there is the physiological anomaly of equating pregnancy with abortion. Pregnancy is a natural biological condition involving life. Abortion is not a part of this process. Its end is death.

The school authorities must, on the basis of various religious considerations, make the final judgment. Congress never intended such preemptive action in this delicate area. It is not the proper function of the federal government to preempt this prerogative. This proposition applies to internal discipline, program and employment policies. Additionally, it applies to preemployment policies, especially marital status. In this respect, we see no element of discrimination because it applies equally to men and women.

A third proposition, and a very important one, involves the appointment of teachers to administrative and faculty posts, who are members of religious orders. Many of our schools are conducted by religious orders of men and women. Teaching in these schools is a part of their religious apostolate. Where, for example, a religious order of women is responsible for the conduct of a parochial school, or alternatively, is operating it as a part of their religious mission, then we submit that it would be a violation of their religious apostolate to require that they place a man in charge of the school or to a faculty position which they are operating. This is not a proprietary consideration but one which directly relates to the maintenance of religious orders and their religious mission.

If these basic recommendations are not implemented, the regulation would have the effect of imposing arbitrary guidelines on the exercise of recognized religious beliefs and convictions. It would impose specific burdens on the receipt of federal funds. Both, the First Amendment and the Due Process Clause of the Fourteenth Amendment prohibit the imposition of arbitrary burdens upon the exercise of constitutional rights and inhibit the attachment of conditions to the exercise of constitutional privileges. *Speiser v. Randall*, 357 U.S. 513, 518–519 (1958); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Sherbert* v. *Verner*, 74 U.S. 398 (1963). In the *Speiser* case, the State of California conditioned tax exemption on the taking of a particular oath of allegiance. The Supreme Court of the United States, in holding that the statute was unconstitutional, stated:

"So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."

Similarly, the proposed regulation would have the effect of coercing our institutions to violate their consciences in order to retain or receive federal funds. This obviously violates the letter and spirit of our constitution.

Our obvious concern with this regulation is aggravated by its ambiguity. For example, it is not clear whether such programs as ESEA and ESAA subject parochial schools to coverage. The schools themselves do not receive any financial assistance, the children do. Clarification of this uncertain situation is imperative.

In addition to ESEA and ESAA, we express our concern over proposed rules in the area of vocational education. Our schools receive little, if anything, under these laws, and their situation is aggravated by the fact that the few vocational schools maintained by the Church, are in some instances operated by religious orders, whose Rule requires that they confine their education to a particular sex. In short, religious orders, by dedication, education and religious tradition, have limited their activities to a particular sex. Since these schools differ substantially from the Congressional concept of a vocational education school, we submit that they were never intended to be included in Title IX. Accordingly, consideration should be given to administrative treatment directed to their unique position.

Finally, there is a special situation which deserves comment. The Secretary of HEW stated in a proposed rule (Federal Register, July 12, 1974, Page 25667) that the proposed regulation, which is the subject of this comment, would not apply to sex education. We heartily endorse this position; it is consistent with all of the observations made above and avoids serious interference in a highly sensitive area.

We trust that the above observations concerning the relationship of the regulation to certain critical constitutional considerations, especially the Free Exercise Clause of the First Amendment, will be of assistance to your office in restructuring the regulation so that there will be no conflict between the regulation and the law or, more importantly, between the regulation and constitutional rights.

You may be assured that we will be more than happy to confer with your office in order to more fully articulate our position.

Sincerely yours,

EUGENE KRASICKY.

WELLESLEY COLLEGE,
Wellesley, Mass., June 20, 1975.

Congressman JAMES G. O'HARA,
Rayburn Building,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: Since your Subcommittee on Education is conducting hearings on the Title IX Guidelines, I am sending you a copy of the letter which as President of the Association for Women in Mathematics I sent to the Department of Health, Education and Welfare last fall when the Department invited comments on their then proposed Guidelines. That letter expressed the grave concerns which I have about some of those Guidelines.

I urge you and your Committee to give serious consideration to the reservations about the Guidelines which I am certain you will receive not only from the Association for Women in Mathematics but from other organizations and individuals. Strong and appropriate Guidelines are needed and need to be enforced.

Sincerely yours,

ALICE T. SCHAFER,
President, Association for Women in Mathematics.

Enclosure.

Mr. PETER HOLMES,
Director, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C.

DEAR MR. HOLMES: I am writing to express my concern about some of the guidelines proposed by your Department for the new Part 86 of the Departmental Regulation to effectuate Title IX of the Education Amendments of 1972. The Title is designed to rule out discrimination on the basis of sex in education programs and activities receiving or benefiting from Federal financial assistance.

1. *Terminology.*—Since the purpose of, and need of, Title IX is to end discrimination on the basis of sex in education programs and activities, why not have the guidelines say "*end discrimination against women*", which is what the guidelines are all about.

2. *Curriculum materials.*—Title IX fails to prohibit sex bias in textbooks and curriculum materials, arguing that to do so might violate rights guaranteed under the First Amendment. Since Title VI rules out discrimination against blacks and other minorities in curricular materials, why did that not infringe on the First Amendment? Are women not guaranteed the rights guaranteed to other groups in the country?

Certainly, guidelines should be issued which prohibit sex-stereotyping in curricular materials designed for kindergarten through junior high school and for non-fiction materials for high school students. Sex stereotyping in instructional materials for the young child and high school students is perpetuating society's present view of "male" and "female" roles and should be abolished.

3. *Admissions.*—§ 86.14(c). The guidelines for admission to educational institutions are not applicable to private undergraduate professional and vocational schools. They should be covered by the guidelines. Many women are discriminated against in admission to engineering schools, schools offering a major in architecture, forestry, etc. Women should have the same chance as men to be admitted to such schools.

4. *Scholarships.*—§ 86.35. Title IX should rule out discrimination against women in the awarding of scholarships but does not. It exempts assistance related to athletics which allows institutions to grant athletic scholarships to men without comparable funds being spent for scholarships for women. Title IX also exempts scholarships established under a foreign will or trust; for example, Rhodes Scholarships. HEW cannot force a change in a foreign will or trust, but it can prohibit educational institutions from advertising or cooperating with programs offering scholarships for men only. What the guidelines should allow for a limited time, when a review of the guidelines would be mandatory, are programs offering scholarships to women only (for example, AAUW programs) and should continue to allow such *until* discrimination against women in educational institutions has ceased.

5. *Athletics.*—§ 86.38. The guidelines should require eventual integration or equal aggregate expenditures in athletic programs. The present guidelines offer no hope of "equality" in athletics.

6. *Fringe benefits.*—§§ 86.41, 86.46.

(a) Fringe benefits offered by an institution to its full-time employees should be offered on a prorata basis to part-time employees. However, the definition of permanent part-time employee: "any employee who is expected to work or has in fact worked at least one academic semester at half-time or half-time equivalent" is too restrictive. It would be reasonable, and fairer to institutions, to replace "one academic semester" by "one academic year".

(b) The Secretary's third alternative for monthly retirement payments should be adopted. That alternative would mandate the use of unisex premium or rate tables and require equal contributions and equal periodic benefits for all retired individuals regardless of sex. (It should be noted that the present male-female life insurance tables are already weighted in favor of whites since the life expectancy for blacks is lower than that for whites.)

Health plans should also be based on unisex tables and require contributions and equal benefits for women and men.

7. *Leaves for pregnancy.*—§ 86.47(e) (1), (2). Delete the mentioned sections which treat leaves of employees due to pregnancy as different from any other leaves for medical purposes. These sections require that a physician certify in writing that the pregnant woman is physically capable of performing her duties and require that a pregnant employee notify her employer in writing of her expected date of delivery, at least 120 days prior to such date. These two requirements are not attached to any other medical disability and should not be attached to pregnancies. Section (2) relates the return of an employee, on leave due to pregnancy, to her employment again to a written notification from her physician. In the case of an employee in a teaching position an employer may not require an employee on such leave to return to her employment later than the beginning of the first full academic term commencing after such certification is made. This guideline might well allow a teaching employer to prohibit the return of an employee on pregnancy leave until the following semester, an action certainly infringing on the rights of the individual. Again, this guideline should be deleted.

8. *Enforcement Procedures.*—§§ 86.61–65.

(a) HEW has not spelled out procedures for requiring institutions to comply with the Title IX guidelines. Expecting voluntary compliance is naive. Appeal rights for institutions are spelled out but not for victims of discrimination against women. This should be corrected.

(b) HEW should develop a simple form to be used by complainants in filing complaints. Also a simple form should be devised for institutions to use in answering queries from HEW.

(c) HEW should employ legal personnel versed in educational programs and activities to aid complainants with their complaints and institutions with compliance.

As stated in 4. above the guidelines should have incorporated into them a mandatory review at a later date: for example, five years from now. At that time HEW can determine if the guidelines should be strengthened, some deleted, or abolished.

Sincerely yours,

ALICE T. SCHAFER,
President, Association for Women in Mathematics.

AMERICAN CIVIL LIBERTIES UNION OF GREATER CLEVELAND,
Cleveland, Ohio, May 17, 1975.

HON. GERALD FORD,
The White House,
Washington, D.C.

DEAR PRESIDENT FORD: The Women's Rights Project of the ACLU of Ohio is deeply concerned about the final draft of the Title IX regulations recently submitted to yourself by the Secretary of Health, Education and Welfare. It contains many changes, deletions and additions to the regulations which were published for public comments. This results in a set of regulations which will be of minimal value in enforcing Title IX.

We feel the new regulations would be totally inadequate in the following areas:

(a) The recommendation which would permit the Office of Civil Rights to defer action on any complaint, which had not first utilized the grievance procedure established by the institution, severely weakens the rights of the complainant. Institutions would be allowed to set their own grievance procedure with no standards of due process or time limits. This is a totally new idea, not part of the original regulations, and totally unacceptable.

This section (86.88) should be deleted as should the section limiting the right to call for a hearing to the institution, and not to the complainant. The complainant must be afforded the same rights as the institution accused.

(b) There should be some kind of self-evaluation policy for institutions written into the regulations. (At present they do not exist). The present sex discrimination pattern stems largely from ingrained societal factors, which are mainly unintentional. We feel that this leads to many acts of discrimination which go by unnoticed until challenged by an individual. The recent regulations omit even the regulations for affirmative action in the area of sports and athletics which were previously covered in the proposed regulations.

(c) The adjustment period for institutions to comply with title IX is totally unrealistic and unfair. Title IX has already been delayed over three years and was long overdue in its original enactment.

(d) The regulations dealing with athletics will severely limit the opportunities for women and girls in athletic programs, thereby discriminating in a grossly unfair way. We feel that there should be no distinction between contact and non-contact sports, and that this decision should be left to the discretion of the individual. The new regulations summarily exempt all contact sports under Title IX. This means institutions will be able to maintain single sex teams and deny participation to women again. The regulations should contain provisions for equal opportunity in participation [illegible] in funding.

(e) Although the new regulations [illegible] requirements for equal amounts of all kinds of scholarship money being awarded to male and female students, they allow single sex scholarships to be administered. This procedure denies to one sex the prestige and opportunities connected with certain scholarships, as does the exemption of "foreign scholarships" (e.g. Rhodes). This is highly discriminatory, a violation of the purpose and intent of Title IX.

(f) The special exemption of private undergraduate schools from Title IX will mean the continuance of the ability of these institutions to exclude or require higher admission standards for members of one sex. The original language of Title IX covers admissions to vocational and professional education without any exemptions and should be enforced.

(g) We urge that on the question of fringe benefits, that institutions be required to provide equal benefits irrespective of cost. This policy would fall in line with the approach of the E.E.O.C. on this question. The new regulations which allow institutions the option of providing equal contributions or equal periodic benefits are very discriminatory because the cost to the employee for a given benefit is far more than the cost to the institution. Equal contributions do not purchase the same protection for men and women, as the actuarial tables used in computing pensions are sex segregated.

We ask that these regulations will be revised and redrafted. They are discriminatory, inadequate and will continue to deny to women the equal opportunities envisioned by the concept of Title IX, which are rightfully theirs.

Yours respectfully,

EILEEN ROBERTS,
Chairperson, Women's Rights Project ACLU of Ohio.

BROOKLINE, MASS., *June 2, 1975.*

President GERALD FORD,
White House,
Washington, D.C.

DEAR PRESIDENT FORD: I strongly oppose the weakening of Title IX of the Education Act in HEW's new regulations and ask that you disapprove the regulations in their present form.

Title IX regulations should require the elimination of sex role stereotyping and bias in texts.

Equal athletic opportunity should be guaranteed to all students of all age groups, that is, from kindergarten through college. Specifically, the interest determination and affirmative efforts provisions should be retained. Also, sex discrimination in so-called "contact" sports should not be allowed and certainly should not be institutionalized in the proposed regulations. Participation in any sport should be on the basis of ability only. At the very least, schools should be required to offer and fully support girls/women's as well as boys/men's teams in "contact" sports. I do not want my nieces and future daughter(s) to suffer the same frustrations I did as a sports enthusiast denied the right to fully participate in athletics.

Finally, grievance procedures should establish time deadlines for completing internal review and should provide the complainant with the right to appeal, have a lawyer present, and freedom from reprisal.

Sincerely,

DONNA D. MORRIS.

NESHANIC STATION, N.J., *June 4, 1975.*

Hon. JAMES G. O'HARA,
Chairman, Postsecondary Education Committee, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I have what I feel is a unique point of view on the subject of sex discrimination in school physical education courses, therefore I respectfully request (no. . . *BEG*) permission to testify before your committee when it holds hearings on the new Title 9 rules.

In my opinion, ALL *REQUIRED* PHYSICAL EDUCATION COURSES, WHETHER CO-ED OR SEX-SEGREGATED, *VIOLATE THE CONSTITUTIONAL RIGHT TO PERSONAL PRIVACY.*

In this day and age, when people are demanding the right to control their own bodies, even to the point of homosexuality, abortion and euthenasia, it is utterly incredible that anyone should be required to participate in any kind of physical activity against his will, no matter how beneficial such activity might be. Surely the right to control one's own body includes the right to let it go to seed.

Due to the economic recession, it would really be a great financial sacrifice for me to come to Washington to state any views before your committee. However, my beloved children will be affected by Title 9, so I am more than willing to make the sacrifice.

If you can possibly find room for me on the long list of people wishing to testify, I would be most grateful.

Sincerely,

CONSTANCE SZEFCZEK.

WILLIAMSTOWN, N.J.

DEAR CONGRESSMAN O'HARA: As a woman, mother and feminist I find the regulations for implementing Title IX appalling! How can we call this equality?

1. Contact Sports—They have defined a number of sports as contact sports. Under the present regulations a school may provide one single sex teams and females are prohibited from trying out for these sports. Also, they do not have to provide a female team in this sport. Basketball has been defined as a contact sport, which is rediculous! It is likely that baseball and softball will be so defined. In non-contact sports the regulations are basically the same.

I call this a great injustice to our female students. Title IX is not giving female students equal opportunity. I hope you will look into this matter and correct this inequality.

Sincerely,

DOROTHY VURTHALER.

PHI MU ALPHA SINFONIA FRATERNITY,
Evansville, Ind., April 4, 1975.

Hon. JAMES G. O'HARA,
U.S. House of Representatives,
Washington, D.C.

DEAR REPRESENTATAVE O'HARA: Attached you will find the text of a recent telegram sent to Vice President Rockefeller, Chairman of the Cosmetic Council. It points up the fact that HEW's unauthorized attempt to influence the membership policies of traditionally single-sex, privately funded, collegiate fraternal societies has *not* been stayed by the Bayh Amendment (PL 93-568) to Title IX of the 1972 Education Amendments.

By limiting exemptions to "social" fraternities and sororities the Bayh Amendment promises to deny the several collegiate fraternal societies which exist for other than wholly social purposes their due protection under the Fourteenth Amendment between alleged "types" of fraternal societies which other branches of the Federal Government, notably the Postal Service and the Internal Revenue Service have long held to be indistinguishable.

Under Section 509 of the Education Amendments the proposed regulations, when signed by the President, will be subject to Congressional review for a period of 45 days. On behalf of our 75,000 members we pray you support at that time a resolution of disapproval of those portions of the Regulations which attempt to exempt only so-called "social" fraternities and sororities from the provisions of Title IX. The only fair, logical, and enforceable regulations *must* apply to *all* fraternal societies. If they do not, the results are sure to be chaotic due to

HEW's continued efforts to exceed the scope of its authority by deviating from the oft-stated intent of the Congress.

Respectfully yours,

J. E. Duncan.

Enclosure.

[Mailgram]

Phi Mu Alpha Sinfunia Fraternity JP,

Vice President Nelson Rockefeller,
Chairman, Domestic Council, Capitol Hill, Washington, D.C.

Mr. Vice President: In its commendable effort to constrain HEW from making its own laws in regard to implementation of Title IX of the 1972 Education Amendment we believe the Congress unwittingly allowed the term "social fraternities and sororities" to be included in the Bayh Amendment (PL 93–568) without realizing that many collegiate Greek letter societies transcend purely social purposes. We pray you respect the obvious intent of the Congress as stated in the Congressional Record (26 November 1974, H 11106) and disapprove the portion of the proposed regulations which discriminates to no meaningful purpose against all but social fraternities and sororities. On behalf of our 75,000 collegiate and alumni members we ask the word "social" be deleted from the proposed regulations so they may be applied equally to all traditionally single-sex collegiate fraternal societies.

Respectfully,

J. Eugene Duncan,
National President,
Phi Mu Alpha Sinfonia.

Representative James O'Hara,
U.S. House of Representatives,
Washington, D.C.

Dear Representative O'Hara: Title IX regulations are very important to protect equal opportunities for students in our school systems. The revised regulations are a serious threat in that they do not provide an affirmative action time table, they do not allow direct appeal to HEW of grievances. It is my hope and request that the hearings you will be conducting will address and resolve these and similar aspects in a manner conducive to our democratic system. Thank you.

Sincerely,

Juonni Bolitlo.

March 30, 1975.

Dear Representative O'Hara: Title IX regulations are in conflict with Title VII of Civil Rights Act by letting the institution be in charge of grievance procedures instead of going directly to H.E.W.

There should be time limits for the institution to act to make changes in some type of affirmative action plan.

Sincerely,

Mr. and Mrs. James Matthews.

March 28, 1975.

Re H.E.W. setting up guidelines for title IX.

Representative James O'Hara,
U.S. House of Representatives,
Washington, D.C.

Representatives O'Hara: I would like to express my disappointment in the way H.E.W. is setting up the guidelines for title IX. First of all, the new interpretations were not part of the June version of the guidelines—therefore, the public has had no chance to comment on them. I feel this is not being democratic.

The present guidelines ignore the interests of girls and women in all sports in this country and also impairs the law to provide equal opportunity to all students.

The intent of title IX was to eliminate sex discrimination in schools, not to give permission to eliminate girls from the opportunity of participating in interscholastic contact sports, either integrated teams or single sex teams.

The grievance procedure (as presently set up) is a farce. It leaves the complainant at the mercy of the institution. Also, it sets no time limit to encourage the schools to come into compliance.

There is no way for a complainant to remain anonymous—they must go through the school first before HEW will investigate.

Thank you.

KAREN N. SANFORD.

THE UNIVERSITY OF GEORGIA,
DIVISION OF STUDENT AFFAIRS,
Athens, Ga., June 23, 1975.

Congressman JAMES G. O'HARA,
Chairman, Committee on Education and Labor, House of Representatives Washington, D.C.

DEAR CONGRESSMAN O'HARA: Your sub-committee on post-secondary education is considering the regulations recently issued by the Department of Health, Education and Welfare for the implementation of Title IX. I urge you in your deliberations to consider allowing professional fraternities, sororities, and honor societies to retain their single sex membership under a special exemption. Title IX has gone far beyond its original intent and many of its programs are hurting those it set out to help. Doing away with single sex organizations is an example of this.

Thank you for your consideration.

Sincerely,

M. LOUISE MCBEE.

BROOKFIELD, CONN., *June 25, 1975.*

Mr. JAMES O'HARA,
Chairman, Postsecondary Education Subcommittee, Rayburn House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: Please vote against any action to weaken the Final Title IX Regulations Implementing the Education Amendments of 1972 Prohibiting Discrimination in Education written by the Department of Health, Education and Welfare.

Increased quality opportunities for greater numbers of students is a sound educational objective and is fast becoming an accepted rule in our nation's educational institutions. Allowing exemptions for so called "revenue producing" sports would perpetuate a system already riddled with questionable educational practices, gross inequities and blatant discrimination against women.

I hope that you will consider this before making committee recommendation.

Sincerely yours,

ROBERTA HOWELLS.

[Telegram]

JAMES G. O'HARA,
Subcommittee on Postsecondary Education, Rayburn House Office Building, Washington, D.C.

While I would prefer title IX guidelines that required more positive action to bring about equality of education for women and men in higher education, I urge you to pass the existing proposed guidelines as a start, for we have waited too long.

Dr. BARBARA W. NEWELL,
President, Wellesley College,
Wellesley, Mass.

UNIVERSITY OF MARYLAND,
COLLEGE OF PHYSICAL EDUCATION, RECREATION AND HEALTH,
College Park, June 24, 1974.

Congressman JAMES G. O'HARA,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: Would you please give us support that Title IX not be further watered down. Sports are an educational experience and women should have equal programs and opportunities—though probably not in the same sport activities. Women should have grant in aid opportunities. The athletic budget at the University of Maryland is over 2 million I have been told. But women have only about $33,000 spent on their programs.

I am opposed to revenue producing sports being treated separately because they, like other sport services, have been subsidized by tax money.

Due to overemphasis on many campuses, grave abuses have occurred in the revenue producing sports management. A fairer distribution of monies is well in order.

Sincerely,

ANNE INGRAM,
Professor of Physical Education.

[Telegram]

Hon. KIKA DE LA GARZA,
House of Representatives,
Capitol One, D.C.:

DEAR SIR: I urge you to vote for resolution that will send title IX back to HEW for revision.

GIL STEINKE,
Texas A&I University,
Department of Athletics.

[Telegram]

Hon. KIKA DE LA GARZA,
House of Representatives,
Washington, D.C.

DEAR MR. DE LA GARZA: I urge you to vote for the resolution that will send title 9, regulation concerning intercollegiate athletics, back to HEW for revision.

JOHN W. HOOK,
Chairman, Faculty Athletic Council,
Pan American University, Edinburg, Tex.

[Telegram]

Representative JAMES O'HARA,
Capitol One, D.C.:

Please support a moratorium and request a review of the rules of HEW's title 9.

MIKE VARNEY,
Director of Activities,
Eastern Wyoming College,
Torrington, Wyo.

MANKATO STATE COLLEGE,
Mankato, Minn., June 10, 1975.

DEAR REPRESENTATIVE O'HARA: I have been teaching at Mankato State College for over a quarter of a century and am currently serving as this institution's compliance officer. Those few who oppose equal opportunity and affirmative action delight and cheer any evidence of a weakening in this policy. The potential retaliation and retribution for those who have tried to open the system for the diverse peoples of this country would be great. Of even greater loss would be the denial of these diverse groups of their positive contributions to higher education. Unions and business have made some substantial advances. Surely the gifted people in higher education can be expected to do no less.

I hope you will advise President Ford of the great need for him to issue a public statement of support for equal opportunity and affirmative action for minorities and women in higher education.

Sincerely,

VERONA D. BURTON.

NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS,
Portland, Oreg., June 26, 1975.

Hon. JAMES O'HARA,
Chairman, Subcommittee on Postsecondary Education, House Office Building, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am sorry that the National Association of Student Personnel Administrators was not chosen to testify in person on the final regulations issued by the Department of Health, Education and Welfare for the implementation of Title IX of P.L. 92–318, but I can well understand the difficulty of selecting a limited number of witnesses from the many requests, and we appreciate your invitation to provide written testimony. I would like to acknowledge, however, the very gracious and capable assistance provided to me by Mr. Bueil and Mr. Moose from the Committee staff. I hope that in future matters before your Subcommittee, and in which NASPA shares a concern and interest, we will have an opportunity to present testimony directly.

NASPA is a national organization, founded in 1919, and composed of the chief student personnel officers and their associates from over 1,000 institutions of post-secondary education. It has a total membership of over 4,000 individuals. As Director of the Professional Relations and Legislation Division for the Association, I have been authorized to submit this letter on behalf of the Executive Committee, which is the governing body for the Association.

By way of general comments, we recognize that the statute and its regulations have generated substantial concern and controversy within the educational community. While many have challenged the regulations as going too far, others have complained they did not go far enough, and with these kind of conflicting signals abounding, we believe that the Department of Health, Education and Welfare has performed a laudable job in preparing these final regulations. Their assessment and consideration of the many comments made to them was thoughtful, and the result was, in most cases, creative and complete.

It is well to keep in mind that the regulations are the result of a relatively short, and loosely-detailed statute which attempted to establish a principle—that of fair and equal opportunities for persons of both sexes in our educational institutions. The authority of the statute lies in the limitation of federal funds, and one strongly expressed criticism and question has been the issue of whether programs and activities within an institution which do not directly receive federal funds are under this authority. The preamble to the final regulations answers that question in the affirmative (i.e., all programs are included), but also notes, "that termination or refusal to grant or continue such assistance 'shall be limited in its effect to the particular education program or activity or part thereof in which noncompliance has been found.' " In other words, a program which does not receive direct federal funds, but is a part of the educational institution in some manner, is subject to the authority of the statute, but if that program is found to be in noncompliance, federal funds may be terminated only from that particular program . . . which did not receive federal funds anyway. It is no wonder that this question has been a confusing one.

While the regulations call for compliance by all elements of an institution, it is important to resolve the question noted above. The alternatives seem to be clear—either exempt programs which do not directly receive federal funds from the applicable portions of the law, or hold an institution's funding to be dependent on its compliance in all of its programs. It is NASPA's position that the latter alternative is the better of the two, in part, because any program which views itself as so distinct from the interdependence of the other people, programs, and facilities, which comprise an educational institution, probably should be disassociated from the institution to begin with.

A limitation in this latter alternative is the possible loss of funds to programs which are in compliance because another unrelated program at the same institution is not in compliance. We would hope that the Director could review his enforcement procedures to determine if the authority of the law could be more inclusive for all elements of an institution without jeopardizing programs in compliance.

In other areas of the regulations, we question whether the procedures on dissemination of policy (§ 86.9) are precisely what the Congress intended. While the statute, itself, does not mention notice and dissemination of an institution's policies on nondiscrimination, it is not unreasonable to see that as being an integral part of an institution's efforts at compliance. What might be unreasonable, however, is the manner and extent that an institution is asked to comply. Unlike such notification statements as "The University is an equal opportunity/affirmative action employer," Section 86.9(a)(1) seems to call for a detailed and lengthy explanation of the recipient's policies and efforts to comply with Title IX. We do not believe that this requirement is consistent with the statute, and we would hope the Director would suggest a brief, but definitive statement that recipients could adopt.

Related to the statement, itself, are the procedures for dissemination of the policy, including that the recipient issue the notice in all of its publications within a short period of time from the effective date of these regulations, and that a memoranda or other written communication be distributed to every student and employee. In both instances, a difficult and unreasonable burden can be placed on an institution, a burden that was not intended in the statute.

The notification of the institution's policy in all publications is unreasonable, because most institutions print their major publications, such as catalogues, well in advance of the beginning of the school year, and to maintain this requirement might well cause a reprinting—an expensive proposition. The requirement to communicate directly with every student and employee seems unnecessary, if so many other publications will contain a similar notice. Therefore, it would seem satisfactory, only, to make every reasonable effort to notify students and employees through announcements in existing publications, and other forms of campus communication.

With respect to Sections 86.3 and 86.8 concerning self-evaluation and grievance procedures, it is NASPA's feeling that they provide a reasonable approach toward dealing with Title IX and its provisions. However, we believe that legislative intent in these areas was meant to provide some guidelines in order to insure greater consistency in application of the procedure.

It is interesting to note the provision of lengthy and specific information regarding the area of admissions, athletics, financial aid, etc. while at the same time providing little or no guidance in these two areas which will be of considerable importance in compliance with Title IX requirements.

It would seem reasonable to include in Section 86.8(b), a brief outline which institutions could follow in establishing their individual grievance procedures. We are not advocating one uniform procedure, but suggested procedures on such areas as redress of grievances could provide institutions with a consistent and efficient way of resolving complaints.

In Section 86.3(c), no guidelines or suggestions as to format which may be used, or data-gathering devices has been indicated. It would seem important for the perspective of those who are required to participate in the self-evaluation, and those who may have to read and interpret the results to provide some continuity in these areas wherever possible.

Concerning athletics, it is our opinion that these sections conform to the spirit and intention of the law. One of the basic premises of Title IX as it affects athletics is that of fairness, to the extent that it provides for equal opportunities in each of the categories identified under Section 86.41(c). Furthermore, while providing equal opportunity it does not require that equal expenditures be made under each category.

This section of the regulation emphasizes the opportunity for women in athletics while at the same time permits institutions the flexibility to determine how to provide this opportunity.

One area that appears confusing is that of withdrawal funds from departments or activities in which noncompliance has been found. In spite of the concept that athletics are to be considered as an integral part of the institutions educational program, and, therefore, subject to Title IX requirements, the enforcement mechanism of withdrawal of funds appears not applicable to all athletic departments.

An athletic department may, in fact, not be the recipient of federal funds. However, it is our contention that by being an "integral part of the institution," they are directly receiving the benefits of federal funds which assist in providing support to the institution as well as to individual students. To provide the regulations for equal opportunity and access without any concern for a proper enforcement procedure will only serve to reduce the significant impact of the law, and to permit further abuses of discrimination in the area of athletics.

As noted earlier in this letter, two alternatives are possible, and we favor the one which further strengthens the original concept of Title IX rather than providing additional exemptions.

Another area of substantial controversy relates to the specific exemption of textbook and curricular materials. While we neither advocate the role of federal censor, nor suggest that the concept of equal rights should be rank-ordered over the first amendment, it does seem that the applicability of the statute to this question received rather short shrift. One argument on this matter points out that the statutory language does not suggest any inclusion of textbook or curricular materials. This is true, but conversely, the statute does not suggest it meant to exclude them, either. Given the integral nature of textbooks and other materials to our educational systems, as well as to the process of education, makes the exemption seem more of a deference to a potential constitutional question, than one in which the federal role of censor was at issue.

In this matter, there is a certain irony which must be noted. Executive Order 11246 would prohibit federal funds from being expended on textbooks from a publisher that discriminates against its employees, but as it stands now, there are no restrictions on a purchase with federal funds of a textbook that is discriminatory.

As a closing comment, it is appropriate to suggest a warning against overzealous interpretation of this statute. Title IX was meant to establish equal rights for both sexes, but not at the risk of eliminating individualism or equal opportunities for single-sex activities. For example, most reasonable people would agree that the existence of honorary organizations, exclusively for men. is an invidious form of discrimination. However, where there are comparable organizations for women, it is not necessarily beneficial to force a merger, and eliminate the pride and tradition that might be associated with both groups. We do not believe this was the intent of the statute, and we would hope more consideration could be given to this potential problem.

In conclusion, Mr. Chairman, I would like to thank you for the invitation to submit this testimony. NASPA is an organization which is sincerely and deeply committed to the concept of equal opportunity for all, and we intend to move judiciously in the implementation of Title IX. If there are any questions concerning our comments, or if you feel that I or any member of NASPA can assist you in your deliberations, I hope you will call on us.

Sincerely,

David G. Speck,
Director, Division of Professional Relations and Legislation.

Education Commission of the States,
Denver, Colo., June 24, 1975.

Hon. James G. O'Hara,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, House of Representatives, Washington, D.C.

Dear Mr. Chairman: It is my understanding that your Subcommittee is currently receiving testimony on regulations issued by the Department of Health, Education and Welfare to implement Title IX of the Education Amendments of 1972 prohibiting discrimination in Federally-assisted education programs on the basis of sex. In response to a request to testify during these hearings, we have been advised that the witness list is full for the current series of hearings. Accordingly, I am taking the means of this letter to communicate to you the position of the Education Commission of the States with the request that it be incorporated in the hearing record.

As you may know, ECS is an interstate compact of 47 states and territories formed for the purpose of improving education through collective state action. ECS provides a forum for states to jointly address issues of common concern, whether manifested within states and local agencies or institutions or at the national level. We also support and conduct a number of specific projects and research efforts on educational issues of immediate and critical concern to the states.

Shortly after ECS was formed in 1966, it went on record in opposition to the limitation of individual opportunity by race, sex, national origin, or other factors which should be irrelevant to individual achievement in a free society. In 1973 the Commission voted to establish a special project addressed to Equal Rights for Women in Education and, pursuant to such action, has established a task force and staff to identify manifestations of sex discrimination in education and to assist the states in constructing means for elimination of them. The work of this task force, and indeed, the concern of ECS as a whole, include a full range of education extending from early childhood to graduate and adult programs.

In the course of its work, the task force, which is chaired by Representative Patricia Schroeder of Colorado, has, of course, focused on Title IX and the evolution and regulations pursuant thereto and on the value of establishing national standards in this very sensitive area. As the large number of witnesses appearing before your Subcommittee indicates, the elimination of discrimination in this area and the re-thinking of sex roles which it entails, are a traumatic and controversial process. It is, however, a process which should proceed and with clear direction from the Federal Government.

Educational institutions in the country have been on notice since 1972 of a direct, clear Congressional statement that sex discrimination in institutions receiving Federal assistance is illegal. The regulations issued by HEW are consonant with the purposes of the statute, clearly within its authority, and strike a reasonable balance of the critical need for progress in this area and the value of orderly transition.

We urge that, after due consideration of the issue, the Congress take no action with respect to the regulations proposed under Title IX and allow them to take effect. This conclusion is predicated on the need for a clear statement of Federal policy in this area, the fact that the regulations are a fair and realistic statement of that policy, and the fact that any modification or suspension of the regulations would occasion considerable delay in realization of the goals to which they are addressed.

Sincerely yours,

WENDELL H. PIERCE,
Executive Director.

STATE UNIVERSITY OF NEW YORK,
ATHLETIC CONFERENCE,
June 24, 1975.

Congressman JAMES O'HARA,
Chairman of the House of Representatives, Postsecondary Education Subcommittee, U.S. House of Representatives, Washington, D.C.

DEAR MR. O'HARA: I would like to ask for your support to declare a moratorium on the implementation of the HEW Department's rules pertaining to Title IX of the Education Amendment Act of 1972.

As President of the State University of New York Athletic Conference which includes colleges and universities in Albany, Brockport, Buffalo, Cortland, Fredonia, Geneseo, New Paltz, Oneonta, Oswego, Plattsburgh, and Potsdam, I have had the opportunity to examine Title IX of the Amendments. The Conference is certain that all parties involved do not fully understand the impact of the legislation. No rational person would deny equal opportunities for both men and women. However, each college or university should be allowed the opportunity of providing quality and meaningful programs for their student bodies without Federal intervention. In conjunction with the above most professionals involved with college and university physical education and athletic programs would like to see a more detailed study of the implications of Title IX before they are implemented. Equal opportunity is one thing but control of a college or university program is another issue.

I am certain that you have been bombarded by women's organizations as well as the National College Athletic Association and other men's groups which have gone into extensive detail on certain issues of Title IX so I will not belabor the point but just ask that you give serious attention to the possibility of demanding further study instead of passing a piece of legislation that could seriously damage men's programs in physical education and athletics as well as slowing down the growth of more and better programs for women in our schools.

Sincerely,

DANIEL T. MULLIN.

UNIVERSITY WOMAN'S CLUB,
UNIVERSITY OF GEORGIA,
Athens, Ga., June 25, 1975.

Representative JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, House Office Building, Washington, D.C.

DEAR SIR: I am writing in reference to your committee's hearing on Department of Health, Education, and Welfare Regulations for the Implementation of Title IX of P.L. 92-318.

As president of the University Woman's Club, an organization entering its fifty-first year with 577 current members, I wish to register concern about the negative effect parts of this legislation could have on the normal functioning of our organization and on others like ours.

The University Woman's Club has traditionally been a woman's organization of a purely social nature. While our membership is open to "any woman faculty member; wife or hostess of a faculty member; woman member or professional or administrative staff; wife or hostess of professional or administrative staff . . .". we have several interest groups for couples, and most of our evening functions include men. Any man interested enough to attend our programs would be welcome.

Our problem is that, while we are in no way a part of the University of Georgia's educational program, we do need the use of certain facilities for our meetings. Our dues are kept low to allow broadest participation, and we cannot afford to hold all functions in commercial places. In a university town like Athens, there are no large non-commercial meeting rooms or auditoriums other than on campus. Thus we depend upon university facilities for the majority of our meetings, and we do feel we do perform a definite service to the University community both in the realm of welcoming newcomers and in providing congenial social outlets for university-connected women and their husbands or escorts.

I strongly feel that our organization in no way violates the intent of Title IX. In correspondence with the Director of the Office of Civil Rights, Mr. Peter Holmes, our last year's president was given to understand that the University Woman's Club should be classified in the same category with social sororities and Girl Scouts and thereby would be exempt from restrictions under the law. A careful reading of Subpart B of Part 86 under Subtitle A, however, seems to give no clear-cut exemption for us. (Unfortunately, our members are all over nineteen years of age!)

We therefore request that your committee consider adding a clause pertaining to groups such as ours. There must be hundreds of similar clubs throughout the country, and if you have not heard from them, I am certain it is because they are not yet informed. A group like ours has no national organization or financial resources to lobby for us, but there will be thousands of very unhappy women voters when the full effects are felt.

It seems ironic that a law originally intended to help women might turn out to have an adverse effect in some cases.

Thank you for your consideration of our request.

Sincerely yours,

LUCY N. TRESP (Mrs. L. L.),
President, University Woman's Club.

COALITION OF LABOR UNION WOMEN,
March 6, 1975.

HON. JAMES O'HARA,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: We feel it most important that, as Chairman of the Committee conducting the "Hearings" on the Title IX guidelines and regulations, we make you aware of our deep concerns.

Michigan Coalition of Labor Union Women and the Michigan Democratic Women's Caucus strongly support the implementation of the Title IX Educational Amendments of 1972 and the guidelines associated therewith, and the authorization and funding either to the State Board of Education or the Michigan Women's Commission for exercising an overview and compliance function in relation thereto.

We are unilaterally opposed to any weakening or dissolution by HEW and others of the published guidelines. We feel strongly that sexism and inequality have no place in any educational function in this free and equal society and Country.

Thank you for your consideration of our views.

Sincerely,

ANN SHAFER.

MODERN LANGUAGE ASSOCIATION OF AMERICA,
New York, N.Y., March 7, 1975.

HON. JAMES O'HARA,
U.S. House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE O'HARA: Title IX, which your House Special Subcommittee on Education will be considering, is a mater of vital concern to our profession as a whole, and especially to women students and professors. Goals and timetables must be firmly set and fairly enforced if affirmative action is to fulfill the promise of a more equitable educational experience for women.

Please, in your deliberations, take into consideration the points made in the enclosed letter, a copy of one which the MLA Commission on the Status of Women in the Profession sent last fall to Mr. Caspar Weinberger, Secretary of Health, Education, and Welfare. It offers our studied opinions on the important issues at stake. We will be most interested in the decisions your Subcommittee makes.

Very truly yours,

KITTYE DELLE ROBBINS.

MODERN LANGUAGE ASSOCIATION OF AMERICA,
New York, N.Y., October 5, 1974.

Mr. CASPAR WEINBERGER,
Secretary of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. SECRETARY: The MLA Commission on the Status of Women in the Profession is vitally interested in the Title IX regulations which you are now formulating. Although we wholeheartedly support the basic purpose of Title IX, we do have questions and reservations concerning certain items in the proposed regulations. Some areas need additional strengthening, others would be improved by amendments or deletions. We urge you, in your deliberations, to give your attention to the following points:

First, as to the schools covered by the Act, we feel that admission to private undergraduate vocational or professional schools should be open to all, and we therefore recommend the deletion of the exemption accorded to them in 86.2(m) and (n). The exemption in the Act, moreover, of religious institutions should apply only to bona fide doctrinal matters and not to mere habitual procedures. The rights of women students at such institutions should be upheld, as should those of faculty (e.g., a woman theologian at a divinity school) who may teach there.

Second, as to remedial action and compliance with the provisions of Title IX, 86.3ff, affirmative efforts should not be optional, nor should they be limited to the area of athletics alone. There is scarcely any area, from academic disciplines to extra-curricular activities organized by the schools, in which such efforts would not prove beneficial. We recommend that remedial action be required of all institutions that have discriminated, whether or not there has been a formal determination of discrimination; that they should be required to undertake a self-study in order to discover areas in which said action is needed, and that they should develop a written plan of affirmative action to overcome the effects of past discrimination. We further recommend that the form by which the schools submit assurances of compliance should ask more than verbal promises, that it should be enlarged in scope to include not only admissions but treatment of students, that it should also cover faculty and staff, that it should request hard data on the areas affected by Title IX, and that the compliance forms should be developed with the assistance of professional associations, civil rights' and women's groups.

Third, as to admissions to institutions subject to the Act, 86.21ff, it is important, since many women are part-time or older students, that there should be a specific prohibition of practices and policies in admissions and in other areas (such as scheduling classes and financial aid) which would have a negative effect on these students, as compared to full-time and/or younger fellow students. Also, in admissions to graduate and professional schools, no preferences should be allowed which would tend to favor applicants from institutions which themselves are single-sex or predominantly one sex, even if the disadvantaged applicants would be few in number. Wherever discrimination has existed in the past, remedial and affirmative action should be required, and the regulations should offer as a guide examples of appropriate recruiting activities and practices.

Fourth, as to course offerings and counseling services, we support the requirement, 86.34, that all courses, including physical education courses, be integrated. Increasingly, men and women are participating together, both in work in play activities, in the society as a whole. Integrated classes are a natural and wholesome way to accustom students to this interaction. They are also a safeguard against the old "separate but equal" policy which, in sex as in race, has usually led to inferior opportunities for the less-favored group. We approve of the regulations applying to counseling, but believe that they do not go far enough. It is not sufficient to say that students may not be given overtly sex-typed materials; schools should be required to evaluate the materials they use, in order to rid them of stereotypes which downgrade and discourage women from entering various fields or striving to excel in them; a conscientious effort to develop materials free from sexist bias should be required.

Fifth, as to financial assistance, 86.35, we strongly support the abolition of single-sex scholarships, fellowships, etc., despite the minor difficulties involved in changing wills, trusts, and bequests. Similar discrimination on the basis of race has already been ruled invalid. Sex, like race, is no criterion for the determination of academic fitness. We feel that this reasoning aplies, even more strongly, to foreign scholarships, and that they, therefore, should *not* be exempted. The Rhodes has already been denied to several outstanding nominees simply because they were women. The benefits and prestige of such an award are so great and so influential on the course of a person's subsequent career that a woman candidate is indeed invidiously discriminated against when denied the opportunity to participate solely on grounds of sex.

Sixth, as to health insurance and services, 86.36, the prohibition against discrimination is again necessary but not sufficient. To the extent that health services and insurance are offered by an institution, an equal level of assistance should be offered to each sex. Equivalent services and benefits should be provided to all students and staff, even though certain ones may be used more by one sex than the other. Family planning, gynecological care (whether or not related to pregnancy), and treatment of male urological problems, etc., should all be included in a comprehensive health plan.

Seventh, as to part-time employees, 86.41, we believe that the regulations covering them should be rigorously enforced, for here, as in the case of part-time students, a disproportionate number of them are women, and work on this basis often occupies a substantial period of their professional lives. Moreover, in the current situation, as schools experience lessening enrollment and/or financial support, part-time staff is likely to fluctuate widely, old positions diminished or abolished while new ones are created by the loss of former full-time positions. Part-timers, vulnerable seasonal workers in academe, need all the on-the-job protection they can get. All benefits, including fringe benefits, should be provided for part-time employees on a pro-rated basis, wherever feasible, or, in the case of benefits not easily provided on a proportional basis, should be offered to the employee via a partial-payment plan in which the employee may pay the remaining amount to obtain full coverage if she or he so desires.

Eighth, as to pay and pension benefits for all employees, 86.44 and 86.46, the first of these regulations is unclear and needs to be rewritten in accordance with the principles relating to salary discrimination as enunciated under Title VII and the Equal Pay Act; the second permits continued discrimination against women by its equal contributions *or* equal benefits provision. Under the terms of the regulation as it now stands, a woman retiree who lives to be seventy could receive less in benefits than a male colleague who reached the same age, though she had paid in an equal amount, or conversely, she might have been required to pay more, to obtain the same benefits. Both possibilities are inequitable. We recommend requiring equal contributions *and* equal benefits for members of both sexes and all races, and the use of unisex actuarial tables where benefits are computed by means of tables.

Ninth, as to pregnancy and maternity leave, 86.47, we approve the proposed regulations with these exceptions: a woman should not be required to give her employer prior notice of her expected delivery date (though she would undoubtedly inform said employer as a courtesy some days beforehand)—giving birth should be treated as any other temporary disability or emergency, such as surgery; she should not be required to furnish a physician's certification of ability to work either before or after her delivery, unless such certification is required of all workers with temporary disabilities (surely a pregnant woman, like any other person, is the best judge of her own ability to work); furthermore, a woman who takes leave for pregnancy or childbirth should not be forced against her will to remain on leave until the beginning of the next academic term (there is no such requirement of a person, male or female, whose broken leg or illness necessitates some time off the job). Finally, I suggest for your consideration that paternity leave is not a joke, but an idea with both theoretical and practical merit, not however as an equivalent of maternity leave (to which a rough correspondence might be sick leave for hernia or prostate surgery), but rather as a special form of compassionate leave in time of family emergencies which might be offered to all employees. An endorsement of such a leave policy could well be included in these regulations.

Tenth, as to enforcement procedures, 86.61 ff, we are concerned by the lack of due process and other rights for complainants, especially as regards hearings and appeals. We also feel that the regulations allowing complainants to participate as *amicus curiae* at formal hearings should be broadened. There should be a requirement that individuals and organizations filing complaints be advised of their right to participate in this manner. They should, moreover, have the right to ask relevant groups, such as civil rights organizations, women's groups, and professional associations, to represent them, and such interested groups should be able to participate even in the absence of complaints, so that the rights of students, faculty, and other staff may be represented at these hearings. Furthermore, travel and hearing-related expenses should be paid for persons who participate as *amicus curiae*, just as they are for government witnesses.

In closing, I should like to mention some general deficiencies visible in the proposed regulations, matters for action in your revisions. There are far too few examples, either of discrimination to avoid, or of remedial action to adopt, in the regulations, with the result that institutions will lack guidance in following the regulations. There is a distressing lack of time-frames, for implementation, investigation and enforcement, with the result that compliance could be deferred almost indefinitely. Finally, a most pressing area of concern, textbook and curriculum reviews, has been entirely omitted. We urge you to repair the oversight by adding the requirement that institutions develop procedures to review and evaluate their courses and texts on a periodic basis, in order to get out sexist bias and to create new courses and materials appropriate to the new, free society that is coming of age. As Alexandra P. Buek and Jeffrey H. Orleans have noted, separate education of the sexes has a detrimental effect on students throughout their lives, for it deprives them of opportunities to prepare for interrelations of the sexes in the larger world, as well as in the school itself. Please keep this in mind as you make and enforce the regulations of Title IX.

Very truly yours,

KITTYE DELLE ROBBINS.

AMERICAN ASSOCIATIONS OF PRESIDENTS OF
INDEPENDENT COLLEGES & UNIVERSITIES.

March 18, 1975.

Hon. CASPAR W. WEINBERGER
Secretary,
Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. SECRETARY: I write as President of Principia College and on behalf of the more than 100 presidents of independent institutions of higher learning located throughout the country who are members of this Association.

I write specifically on your regulations on Title IX of the Education Amendment of 1972, P.L. 93-318, 86 Stat. 373, 20 U.S.C. §§ et seq. Our membership believes that your proposed regulations:

(1) are in excess of the statutory authority conferred by Congress.

(2) violate the academic freedom of those educational institutions subject to them,

(3) impose impossible burdens unjustified by the Act's purposes, and

(4) are so hopelessly vague and ambiguous that they deny the institutions subject to them due process of law.

My fellow college presidents in the Association and I firmly believe that implementation of the proposed regulations:

(1) will decrease the overall quality of education in private universities and colleges,

(2) will eliminate the diversity in higher education that is a major strong point of the American system of higher education, and

(3) will place added financial burdens on those institutions which are already under severe financial strains.

Because our Association believes that these regulations constitute a most serious threat to the viability and freedom of private American education, it submits that all the regulations should be withdrawn and redrafted as suggested in our detailed brief filed with your office in October 1974 by our Washington counsel, Wilkinson, Cragun and Barker. Our membership authorized us to file this brief, of 56 pages, which outlines our comments and suggestions on the proposed regulations to Title IX. Should your office require an additional copy, they can contact Gordon Coffman on 833–9800. By making such suggestions, this Association should not be deemd to be conceding the propriety of any new regulations. This Association expressly reserves its right to make comments when the newly drafted regulations are promulgated for public comment.

The following resolution was unanimously adopted at the annual business meeting of AAPICU on December 7, 1974:

RESOLUTION

Whereas, the American Association of President of Independent Colleges and Universities is committed to the preservation of genuinely independent private higher education in the United States, and

Whereas, Federal aid to education is being used as a mechanism for increasing government control over private higher education, and

Whereas, the proposed sex discrimination regulations under Title IX are the most recent and most objectionable examples of attempts to extend Federal control, and

Whereas, the membership of AAPICU, nevertheless, expresses its strong support for providing equal opportunities in higher education for all persons regardless of race, creed, or sex: Now, therefore, be it

Resolved, That the Association seek legislative remedies:

First, to reduce the circumstances under which nominal or incidental Federal aid would constitute a legal basis for Federal control, and

Second, to limit the scope of any such Federal control to the specific institutional program or activity directly supported by the Federal aid.

We are accordingly proceeding with our efforts to obtain legislative relief.

Mr. Secretary, I wish to state that sometimes the battle to maintain true independence for at least a sector of higher education seems difficult in the face of the momentum and magnitude of current trends toward government control and government largess. However, I for one want to state categorically that we must overcome this trend toward government control. I would say from the vigor and determination of the actions and discussions of our members that my fellow college presidents will continue to press for modification of these Title IX resolutions with their faculty, students, trustees, the media and their representatives in government.

I am sending copies of this letter to Congressman O'Hara and the members of his Subcommittee on Postsecondary Education. Copies are also being sent to our membership for their action.

Sincerely,

DAVID K. ANDREWS, *President.*

Enclosure.

NATIONAL ORGANIZATION FOR WOMEN,
Chicago, Ill., March 14, 1975.

Hon. GERALD FORD,
President, The White House,
Washington, D.C.

DEAR PRESIDENT FORD: I am writing to request that you carefully consider the provisions of the proposed Title IX Regulations before signing same and submitting them to Congress. They are objectionable, will continue to preserve the status of women as second class citizens in our educational systems and, in the instance of some parts of the athletics section, will be unconstitutional with the passage of the ERA.

The proposed regulation defining contact sports and prohibiting women from playing in contact sports with men, or from having their own teams in contact sports effectively retains the status quo of existing athletic programs in the schools. This provision eliminates the female's right to chose what sports she wishes to participate in and additionally implies that while it is perfectly alright for boys and men to get injured by participating in contact sports it is not alright for women. Female students, given the opportunity to choose the sport they most wish to participate in, have overwhelmingly chosen basketball all across the country. In anticipation of the Title IX Guidelines many schools and colleges have implemented, or are making plans to implement, interscholastic basketball competition for women. A conservative estimate of the number of schools that will drop these programs now that they are no longer required to provide such teams for women is 50%. Girls enjoy dribbling, shooting and wearing sneakers as much as boys do. The contact sports provision leaves women with two team sports, field hockey and volleyball. How would you like those options?

Further, the clause requiring affirmative action for the discriminated against sex has been dropped and the proposed survey to determine student interest has been dropped. How can we require affirmative action in employment and not require it in education? And again, the right to choose is being denied us.

Finally, there is the grievance procedure. Students and employees who wish to file Title IX complaints must not go through a grievance committee made up of personnel employed by the institution which has offended against them. This is ridiculous. Such complaints will no longer be confidential and the complaining student and/or employee will leave herself open to harassment by institution officials.

The issue closely parallels the desegregation issue. Southern schools refused to desegregate until the Federal Government forced them to do so. This issue of sex-based discrimination against women is not going to be resolved until the Federal Government forces educational institutions to recognize women as being equal under the Bill of Rights. Eisenhower's administration did not call for desegregation in small amounts, one area at a time and we cannot call for an end to discrimination against women by bits and pieces.

Accordingly, I request that you veto the proposed Title IX Regulations and return them to HEW for rewriting to eliminate sex-based discrimination in *all* aspects of our educational process, not just the areas that HEW feels comfortable with. No one felt comfortable with integration yet the Republican administration at that time did not falter in its duty to mankind. Now we are dealing with womenkind and the only difference is physical. The highest incidence of discrimination occurs in the area of athletics and physical education and the proposed regulations do nothing to change this.

Sincerely,

JANICE L. CUNNINGHAM.

CHI OMEGA, GOVERNING COUNCIL,
Cincinnati, Ohio, October 1, 1974.

Hon. CASPAR W. WEINBERGER,
Secretary, Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. WEINBERGER: On behalf of the thousands of women of the United States who are members of Chi Omega Fraternity we, the Governing Council of Chi Omega, are writing to request the addition of the following statement under "Subpart B—Coverage" in the proposed regulations for the implementation of Title IX of the Education Amendments of 1972.

"Social sororities and fraternities and honorary and service organizations are exempt from these regulations."

We are convinced that the regulations are not meant for organizations such as ours but we feel it is crucial that this be clearly stated so that there will never be any misunderstanding about it. Our assumption of exemption is based on the following:

1. The Civil Rights Act provides an express exclusion for sororities and fraternities in 42 U.S.C. § 1975 C (a) (6) which states:

"Nothing in this or any other Act shall be construed as authorizing the (Civil Rights) Commission, its Advisory Committees, or any person under its supervision or control to inquire into or investigate any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization."

2. The Higher Education Assistance Act in 20 U.S.C. § 1141 (b) states:

"Nothing contained in this Act or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institution."

3. Sororities and fraternities as well as service and honorary organizations complement but are not a substantive part of education programs and activities.

4. The Congress that passed Title IX contained many individuals with fraternity affiliations, including the current President of the United States. In the absence of considerable discussion about it, it is impossible for us to believe that Congress intended for the law to abolish single sex social sororities and fraternities.

5. As college women we have experienced the type of discrimination we believe the law was meant to stop. We have seen the inequity between the women's physical education facilities and those of the men. We have been denied leadership roles in educational institutions and watched while less qualified men were hired. We know discrimination on the basis of sex when we see it, for *we* have experienced it. We also know that the sorority-fraternity structure, by providing comparable opportunities for both sexes is *not* discriminatory.

6. Finally our assumption of exemption is based on the fact that if the regulations of Title IX were to adversely affect sororities and women's service and honorary organizations, HEW would be guilty itself of gross discrimination.

The predominately male Congress exempted from these regulations those undergraduate institutions that are the primary sources of male leadership in the United States, such as the military academies and Harvard. It is clear that to somewhat balance those exemptions these regulations must also exempt those campus organizations that insure leadership opportunities for women. Leadership development is a primary focus of Chi Omega as we believe it is of all sororities. As women we are interested in preserving those organizations which provide women with leadership encouragement, leadership training and leadership experience. For HEW to listen to the men of Congress—as it must—and thereby preserve major male leadership sources and then fail to listen to the thousands of women we represent who seek to retain a leadership base for women, would indeed by discrimination on the basis of sex. We cannot believe HEW would be guilty of this.

We are aware of the fact that the proposed regulations were changed in respect to competitive athletics when men pressed for such a change. As women, we care about our sororities and service and honorary organizations as much, if not more, than the men care about their sports. We are confident that because of your obvious commitment to equal treatment of the sexes, the request of thousands of women for the inclusion of an exemption statement concerning social sororities and fraternities and service and honorary organizations will be implemented just as was the male request for a change in the regulations concerning competitive athletics.

Sincerely yours,

Mrs. LaRue Bowker,
President.
Dr. Mary Ann Carroll,
Miss Margaret D. Lyon,
Mrs. D. W. Ferris,
Mrs. Fred Orman,
Mrs. Charles Thomas.

Florida Southern College,
Lakeland, Fla., August 21, 1974.

Hon. Carl D. Perkins,
Chairman, Committee on Education and Labor, House of Representatives, Washington, D.C.

Dear Sir: Please permit me to bring to your attention several serious concerns we in private education have about some of the regulations regarding nondiscrimination based on sex which the Department of Health, Education, and Welfare proposes to put into effect in January of 1975. Many of these regulations will have a profoundly adverse affect on private colleges changing their nature so substantially as to diminish their rich contribution to the scene of American higher education. We seek your help in securing exemption for private colleges from these proposed guidelines.

The Office of Civil Rights' proposal on "Nondiscrimination on the Basis of Sex" which HEW intends to add to its Regulations as Part 86 goes beyond effectuating Title IX, Section 901 of the Higher Education Amendments of 1972 (Public Law 92-318); the HEW proposal patently exceeds the intent of the law.

The law which Congress passed and the President signed states that "no person in the United States on the basis of sex, be excluded from participating in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial aid." The law quite explicitly, and I might add rightly, intends that institutions receiving federal assistance must recruit both sexes comparably and must afford equal access to enrollment and to participation in all programs, services, and activities of the institution. It is evident, however, that it is not the intent of the law to be so specific as to prohibit "a college . . . from assisting private fellowship or scholarship programs which are limited to members of one sex or for which members of each sex are selected separately." Private colleges depend very heavily for their continued existence on donations from private individuals, foundations, and corporations. To take away the right of a person, foundation, or corporation to exercise discretion in the choice of a recipient of a gift including the sex of the recipient is not only unjust to the donor but will serve to work a great hardship on private educational institutions by stifling such donations. Furthermore, it is a lively possibility that bequests, deeds of trust, and other legal instruments that yield proceeds for financial aid to students will be labeled discriminatory by HEW simply because the sex of the recipient is designated. This would be extremely unreasonable, bringing needless privation of funds to students as well as educational institutions. Few things would be more devastating to us financially. It is hard to imagine that such was the intent of Congress or the President when this law was enacted.

It is also evident that it is not the intent of the law to be so specific as to force a private, residential college such as Florida Southern College to apply identical rules of appearance for men and women students and to cease having established hours at night for the closing and locking of women's dormitories in the exercise of reasonable concern for the safety of women students, unless the College also has precisely identical processes in men's dormitories even though the safety requirements for men students differ from those of women students. Such regulations as proposed by HEW fly in the face of reason. Men and women students are in fact different, not identical. Some reasonable accommodation to this elemental fact is required in the formulation of college rules pertaining to appearance and the personal safety of students. College rules of appearance that reasonably reflect the differences between men and women students are not discriminatory just because they are different; yet, this is the logic of the HEW proposal. Safety requirements for men and women students differ, and college rules which reasonably reflect these different safety requirements are not discriminatory merely because they are not identical; yet, this is the stated conclusion of the HEW proposal.

Furthermore, such specific requirements forced by the federal government on a private, residential college will so hamstring private higher education as to alter its nature and thereby threatening the existence of the creative pluralism which makes great American higher education, composed as it is of both the public and private sector. It will deter Florida Southern College as a private educational institution from the pursuit of its legitimate goals of not only educating the minds of students but also preparing the whole person—both men and women—for living in the world that actually exists. The precautions for personal safety which a woman must take in our society do in fact differ from those of men. It is the right of a private college to teach this by reflecting it in its philosophy and structure. For a private college, against its best judgment and conscience, to pretend that the safety requirements for men and women are identical in our society and govern itself accordingly, so educating its students, would mislead students and create a dangerous illusion in the minds of both men and women students. We as a College have the responsibility to prepare persons to live wisely in the world that is, not in the world of someone's Utopian fancy.

Be assured that Florida Southern College is eager to comply with the letter and intent of the law passed by Congress and signed by the President. However, the Department of Health, Education, and Welfare's efforts at implementation of Public Law 92-318 with such a high degree of detail and specificity only a portion of which I have lifted up in this letter represent an arbitrary interpretation of the law in many instances and go far beyond the intent of the law. Respectfully, I am asking you to do us and all of private higher education the favor of reviewing these HEW proposals, and, if you will, of registering the several concerns reflected in this letter with the appropriate HEW officers, and of doing whatever you can to relieve these extremely problematical issues.

Thank you for your support and help.

Sincerely,

WALTER Y. MURPHY,
Executive Vice President.

CONNECTICUT MUTUAL LIFE INSURANCE CO.,
June 5, 1975.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I would like to encourage you to vote against the Ford proposal recently given to the Department of Health, Education and Welfare on permitting women equal opportunity to participate in athletics.

Sincerely,

WILLIAM H. MORRIS, Jr.

Enclosure.

CONNECTICUT MUTUAL LIFE INSURANCE CO.,
June 5, 1975.

Re Equal Opportunity for Women in Sports.

President GERALD FORD,
The White House,
Washington, D.C.

DEAR PRESIDENT FORD: I have supported you throughout your term in office, and have really been a fan of yours while you were a Senator. I do not agree with you, however, on your proposal concerning the equal opportunity in sports idea even though ideally it sounds good. Realistically speaking you couldn't get a thousand poeple to go out and watch a women's football team play, and therefore their existence could not be justified unless they could stand on their own. I feel your proposal is a threat to major college football and basketball and is in direct conflict with the free enterprise system. I am very much surprised at you, being the fan that you are of football and having been a great athlete in your time, of recommending such a proposal. I am going to ask all of our Representatives and Senators to work to veto your proposal as I understand it. I think that this country has enough other priorities and needs of much greater significance right now than something of this nature. If you are talking about equal opportunity academically I agree with you one thousand percent, but otherwise as far as sports are concerned I think you are all wrong.

All in all I still would like to reiterate that I think you have done an excellent job as our President, but I did want you and my Congressmen to know that I differ with you on this particular issue.

Respectfully yours,

WILLIAM H. MORRIS, Jr.

[Mailgram]

Re NACDA resolution.

Representative JAMES G. OHARA,
U. S. House of Represenetatives,
Washington, D.C.:

The Officers and Executive Committee of the National Association of Collegiate Directors of Athletics adopted the following resolution Sunday, June 22 in San Diego, California, the National Association of Collegiate Directors of Athletics endorses entirely the philosophy that women and men students should have an opportunity to participate and excel in intercollegiate athletics and is committed to working to that end.

Mowever, NACDA is very concerned about the potentially disasterous effects of the title IX implementation regulations as written and interpreted by the Department of Health, Education and Welfare which would be entirely counterproductive to the improvement and continuation of both men's and women's athletic progress. NACDA notes the current efforts of the nation's colleges to effect economy measures in existing men's intercollegiate programs in order to expand women's programs and maintain economic stability in college athletics.

Further, women's programs have made substantial progress and will continue to do so without unwarranted Federal regulations, we respectfully request that Congress disapprove the athletic sections of the implementation regulations of title IX and place a moratorium on the enactment of these regulations until such time as the Department of Health, Education and Welfare can conduct an impact study upon the intercollegiate programs for women and men.

We strongly urge that the joint effort of the Congress and the colleges and universities in maintaining and improving the strongest intercollegiate athletic program in the world today.

SAN DIEGO, CALIFORNIA, NATIONAL ASSOCIATION
OF COLLEGIATE DIRECTORS OF ATHLETICS.

BRIGHAM YOUNG UNIVERSITY,
Provo, Utah, May 23, 1975.

Hon. ALLAN T. HOWE,
Congressman From Utah, Congress of the United States, House of Representatives, Washington, D.C.

DEAR ALLAN: We have been advised that Title IX has been referred to President Ford for his signature. Advance information reveals that the regulations submitted to the President are now being reviewed by the White House staff for final procedures.

Brigham Young University and all other members of the National Collegiate Athletic Association are gravely concerned that our intercollegiate athletic program will be seriously affected if Title IX, as now implemented, is signed by President Ford. We are hopeful that you will take time from your busy schedule to review this legislation in specific areas that vitally concern the future of our athletic program.

We are aware that support should be accorded for the continued and orderly growth of women's intercollegiate athletics. We cannot, however, see the wisdom in providing an athletic program for women at the expense of a fully and long established athletic program for men. We believe there is a place and a solution to the opportunities for both sexes to have the opportunity to participate in athletics. Brigham Young University, as you know, is observing its centennial year at the present time. You are also aware of the struggles of all of our higher institutions of learning in Utah to reach the position in athletics we now have. It seems folly to me to allow the women equal financial opportunity at the expense and reduction of the men's program when their program is in the neophyte stage. Shouldn't the women experience the same growth processes we had to struggle through?

Brigham Young University now offers to its students programs in eleven sports. In our opinion, these experiences derived through controlled competition, cannot be gained in the classroom, but yet are very important in the development of the whole person which causes the experiences to become a part of the integral processes of education. If Title IX, as presently implemented, is signed by the President, consensus of opinion results in our underwriting only our two income sports, namely football and basketball. The other nine programs we now finance will be forced to a club sports level. On a club sports basis the individual is deprived of adequate coaching and leadership, competition, travel, etc. which are all important in building patterns and habits for future good citizens. Why penalize these individuals when other things can be worked out with inequality to either sex?

There are three crucial areas of the regulations that cause us concern. These are as follows:

1. The major government intrusion into the management of individual colleges and universities. HEW's improper extension of the law reaches beyond those programs of an institution which receive Federal funding to embrace each and every program of the institution, including intercollegiate athletics which receives NO Federal financial assistance.

2. The unwarranted and illegal effort to circumscribe gross revenue of individual sports. The regulations are directed toward requiring that the total expenditures for men's and women's sports are equal, regardless of the income potential of the respective sports and traditional donor support. The regulations are a major assault upon the revenue producing potential of men's intercollegiate athletics and do not recognize the need for increased expenditures for those sports which attract greater attendance.

Institutional management must be free to determine expenditure commitments for various sports, dependent upon student participation, student body spectator interest and general fan support.

3. The sex test for athletically related scholarships. Of all the financial grants awarded by an institution, this criteria would be applied only to athletically related aid and should be eliminated.

What we mean when we refer to the "sex test" for athletically related aid is that Section 86.37(d) requires awarding athletic grants-in-aid on the basis of sex (as opposed to ability) in regulations which are intended to prohibit sexual discrimination. To be consistent, HEW should require the same treatment of scholarships in nursing and engineering—in other words, no more women could receive nursing scholarships than men. The obvious counter-productivity of such a situation in nursing was apparent even to HEW, but it feels it is appropriate in athletics.

We believe the only appropriate test on scholarships should be whether they are awarded without sexual discrimination. We recognize you are very busy in the execution of your many details of your office. We hope, however, you are not too busy to evaluate and recognize the serious consequences that will result to athletics and the serious effects a reduced program will have on American youth. A weekend intercollegiate athletic program will deteriorate many facets of American life.

Both men and women athletic programs can become possible on an inclusive level if the following suggested revisions are made in the final draft of the Title IX regulations:

1. In order to confine application of the regulations to Federally-funded programs, delete "or benefits from" from Section 86.11, and any other comparable provision of the regulations.

2. In order to recognize that program differences reflecting revenue-producing ability are not sex-based differences, and to prevent erosion of an important source of financial support for intercollegiate athletic programs, amend the final sentence of Subsection 86.41 (c) to read as follows:

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, *nor will differences in expenditures or programs resulting from the allocation of self-generated revenues to the teams concerned constitute such non-compliance*, but the Director may consider the failure to provide necessary funds for teams of one sex in assessing equality of opportunity for members of each sex.

3. In order to eliminate the sex test for athletic scholarships, strike Section 86.37(d)(1), and everything following the word "paragraph" in present Section 86.37(d)(2).

We are requesting your immediate attention to help us insure a continuation of our strong intercollegiate athletic program. Your effort will also help us to continue a development of physical, social, religious and moral values to preserve the strength of a great nation. Elimination or curtailment of athletic opportunities or each future citizen to develop his total abilities through competitive programs may result in detrimental conditions. Great civilizations have had their downfall because of weakened opportunities for physical, social, religious and moral development. Such civilizations also reached a state of complacency through the lack of discipline, both individually and collectively. Some historians believe our country is now in that stage of complacency with our social and moral problems.

We urge your help in changing the Title IX regulations as suggested to offer and protect the opportunity for our great intercollegiate programs to survive and serve a great purpose for America. This can be accomplished without depriving the opportunity for women to have comparable programs in athletics if the revisions suggested previously will be made in Title IX.

We trust this information will be helpful to you in alerting you to our concern for intercollegiate athletics. We are aware of your knowledge of the number of people that will be affected adversely if Title IX as now implemented is signed by the President. We trust you are aware of the plan of attack you will need to follow to change possible procedures for these regulations.

The people of the State of Utah are grateful to you for the fine job you are doing in Washington as you represent the interests that are vital to our security and welfare.

Kindest regards and best wishes.

Respectfully,

STAN WATTS,
Director of Athletics.

COMMISSION ON THE STATUS OF WOMEN,
San Jose, Calif., May 20, 1975.

Hon. DON EDWARDS,
Congressman,
San Jose, Calif.

DEAR MR. EDWARDS: Pursuant to a unanimous resolution at their regular monthly meeting, the Santa Clara County Commission on the Status of Women (CSW) directed me to write to you in regard to the proposed regulations issued under Title IX of the 1972 Education Amendments.

As you know, Title IX was passed to assure equity for women in education. If the amendments are to be effective in assuring this equity, it is mandatory that the regulations coming from the Department of Health, Education and Welfare reflect the spirit of equality provided in the statement, "no person. . . . shall, on *the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

The Commission on the Status of Women is especially concerned with the provision requiring the establishment of an internal grievance procedure. The Commissioners specifically believe that revision and clarification are essential in the following areas:

The lack of specification of procedural and time criteria for acceptable grievance procedures in the new proposed regulations introduces a major delaying mechanism for recipient institutions.

The regulations indicate an abdication of federal responsibility and place the power for complaint resolution in the hands of those institutions or administrators against whom discrimination is alleged.

They may call into question the increasing use of those grievance procedures negotiated within a collective bargaining or professional agreement for the resolution of complaints of sex discrimination.

The regulations are unclear as to the permissibility of class action or the filing or organizational complaints on behalf of individuals or groups.

They render impossible the protection of complaint anonymity which is provided in other sections of the regulation.

They introduce a precedent for similar handling of alleged violations regarding race discrimination in education and other Civil Rights legislation. Given the present inconsistency of this provision with procedures specified under Title VI, the handling of complaints based upon an interaction of sex and race discrimination is unclear.

The Commission on the Status of Women urges you to finalize the Title IX regulations with the revision of the grievance procedure as recommended above.

Thank you for your kind consideration.

Sincerely,

RITA ROSENBERG, *Director*.

Enclosure.

Whereas, Title IX regulations forbidding sex discrimination against students and employees in all federally assisted educational programs as issued by the Department of Health, Education and Welfare leave many loopholes allowing for continued discrimination; and

Whereas, the Congress of the United States has the duty to insure that there be no discrimination on the basis of sex in programs funded by the United States government; and

Whereas, adequate funding is necessary to enforce this program: Now, therefore, be it

Resolved, That the Santa Clara County Commission on the Status of Women urge the United States Congress to demand stronger regulations by the HEW in the following areas:

1. Prohibition of sex-stereotyping in textbooks and other curriculum materials;
2. Standardized and equal admission requirements for men and women in private undergraduate vocational and professional schools when funded;
3. Mandatory affirmative action programs which are implemented and continuously updated;
4. Pregnancy treated as a temporary disability;
5. Equal pension plan payments for men and women upon retirement;
6. Equal availability of funding for athletics for males and females;
7. Greater opportunity for individual resolution of grievances through revision of the existing grievance policy; and
8. Increased funding to enforce these provisions; and be it further

Resolved, That the President, local representatives of Congress, and the Secretary of the Department of Health, Education and Welfare be sent copies of this resolution.

ARLINGTON, VA., *June 4, 1975*.

Hon. JOSEPH L. FISHER,
House of Representatives,
Washington, D.C.

SIR: The newspaper indicates that all Members of Congress will have a chance to vote on the regulations on sex discrimination in educational institutions which were promulgated yesterday by the President and the Secretary of Health, Education, and Welfare. I urge you to reject those parts of the regulations which would forbid sex discrimination in private extra-curricular organizations that are connected with schools or colleges.

Many extra-curricular organisations are self-governing and have membership criteria set by their own constitutions. Schools and colleges have no right or means to interfere in the internal policies of such organisations, except by denying them official recognition, expelling them from grounds, and forbidding them to publicise their activities through facilities open to other groups. Such measures, when taken by a public institution, would constitute an unconstitutional violation of freedom of speech and assembly under the First and Fourteenth Amendments. This conclusion is reached in the light of court cases arising out of similar moves against activist student organisations in the late 1960's and early 1970's.

It may be argued that making school facilities available to a discriminating organisation may constitute "state action" in violation of the Fourteenth Amendment right to equal protection of the laws. But the rights of free speech and free association to protect even those causes and beliefs which are directly opposed to official public policy. Official recognition of an all-male or all-female organisation does not constitute official approval of its policies, just as official recognition of an SDS chapter does not constitute support of its policies and activities. (You may recall that a few years ago, the American Civil Liberties Union was fighting on First Amendment grounds to allow even the National Socialist White People's Party, a clearly discriminatory organisation, to hold a rally open only to white non-Semites at Yorktown High School in Arlington, just as the facilities of that school were made available to other organisations.)

I am a member of the Jefferson Society of the University of Virginia, a literary and debating society founded in 1825 and which had included in its membership Edgar Allen Poe, Woodrow Wilson, Edward R. Stettinius, Jr., and High Scott. In February, 1972, the Jefferson Society amended its constitution to allow women to become members, but only after several years of often bitter debate over this issue. Women have since been welcomed as equals into the Society and have contributed greatly to it. But throughout the debate over their admission, the Society always felt that the decision should be theirs to make, not that of the University administration, and certainly not that of the Secretary of Health, Education, and Welfare. The admission of women under threat of expulsion from the grounds would have destroyed much of the camaraderie and fellowship that makes the Society one which women or men would seek to join in the first place. The Society's memory is long, and the resentment at such coersion would be felt even today.

The Jefferson Society is fiercely jealous of its autonomy, and I suspect that many similar organizations are just as jealous (though few can claim as long a history or as great a devotion to tradition). (We certainly are going to resent it if the Feds come snooping around and telling us to institute some affirmative action program to recruit more women, or ordering us to alter our voting patterns because we do not elect enough women to Society office.)

The proposed regulations would be fine if they dealt only with organizations which are established and supported more by the schools themselves than by their student members. But the regulations as written (or at least as reported in the press) are so extensive as to tread on protected rights of assembly.

Sincerely,

James M. Guinivan.

McLean, Va., *June 4, 1975.*

Dear Mr. Chairman: I wish to tell you that I am in favor of HEW's proposal for Title 9 of the Omnibus Education Bill.

Sincerely,

Elizabeth Campbell.

Texas Tech,
Athletic Department,
Lubbock, Tex., May 28, 1975.

Hon. George Mahon,
House of Representatives,
Washington, D.C.

Dear Congressman Mahon: We understand that the White House Staff is in the final stages of preparing options for the President on the implementation of policy revisions contained in the Implementation Regulations for Title IX. Since this matter definitely affects the future of intercollegiate athletics, we at Texas Tech would like to make the following recommendation regarding the final sentence of Sub-section 86.41(c) to read as follows:

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, *nor will differences in expenditures or programs resulting from the allocation of self-generated revenues to the teams concerned constitute such non-compliance*, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

While Texas Tech does not oppose women's athletics, we do feel that the equal disbursement of monies would prove disastrous to the intercollegiate athletic programs of America. All institutions are providing athletics for women on a voluntary basis and we feel that satisfactory progress is being made in this area.

Again, we call on you for your help regarding the final sentence in Sub-section 86.41(c) of the Title IX regulation.

Sincerely yours,

J. T. King,
Director of Athletics.
Polk F. Robison,
Athletic Administrator of Finance and Development.
John W. Cobb,
Chairman, Athletic Council.
Raymond C. Jackson,
Faculty Representative, Athletic Council.

San Diego, Calif., *June 1975.*

Dear Representative O'Hara: As a psychologist, I feel that Congress should NOT veto the proposed Title IX regulations on sex discrimination. I oppose a move to exempt revenue-producing athletics from the provisions of title IX. Women need to have full equality with men in education and athletics!

Sincerely,

Linda J. D'Addorio.

Florida Southern College,
Lakeland, Fla., June 23, 1975.

Hon. James G. O'Hara,
Chairman, Special Subcommittee on Education,
House of Representatives,
Washington, D.C.

Dear Mr. O'Hara: Please let me bring to your attention a most serious concern many of us in private higher education have about the regulations regarding "nondiscrimination based on sex," Title IX of the Educational Amendments of 1972, which were drawn up by the Department of Health, Education, and Welfare, signed by the President, and passed on to Congress for review. I understand that the regulations will take effect July 21, 1975, unless Congress acts before that date.

Perhaps the most deleterious of the regulations from the point of view of a small, private college is the one mandating identical dormitory regulations for men and women students. It is an incontrovertible fact that the safety requirements for men and women students differ on a college campus. Women students are far more likely to be victims of sexual assaults and rape than men. Greater security arrangements are necessary in women's housing than in men's. I do not believe it was the intent of Congress when it passed the Education Amendments of 1972 to go so far as to force a private college administration arbitrarily to implement identical dormitory regulations for men and women students in situations where there clearly exists a reasonable relationship between the regulations of a women's dormitory and the safety requirements of those women students living there and at the same time a reasonable relationship between the regulations of a men's dormitory and the safety requirements of the men students housed there. Surely in America a private college has the right as well as the responsibility to implement housing regulations commensurate with the safety requirements of students housed in its dormitories.

Furthermore, the regulation will deter private educational institutions from the pursuit of their legitimate educational goal of preparing men and women for living in the world that actually exists. The precautions for personal safety which a woman must take in our society do in fact differ from those of men. It is the right of a private college to teach this fact by reflecting it in its philosophy and structure. For a private college, against its best judgment and conscience, to pretend that the safety requirements for men and women are identical in our society and to govern itself accordingly, so ordering its life and teaching its students, would misguide students creating a dangerous illusion in the minds of both men and women students. We as a private college are in the business of preparing persons to live wisely in the world that *is*, not in a world that exists only in someone's Utopian fancy.

Such a regulation if forced on a small, private, residential college will take away from private higher education the right to be distinctive and reflect legitimate parental concerns and will have a homogenizing effect on American colleges and universities. It will so alter private higher education as to threaten the existence of the creative pluralism which makes American higher education great, composed as it is of both public and private sector.

I urgently plead for enough latitude in the regulation to permit a private college to meet adequately the differing safety requirements of its male and female students in regard to college housing and to proceed with its legitimate educational task in a way that does not discriminate against either sex but rather rationally provides for the well-being of all of its students. This regulation patently exceeds the intent of Congress. I implore you to do all you can to delay the implementation of the regulation so that Congress will have time to bring it into line with what Congress intended when it passed the law in 1972.

Sincerely,

WALTER Y. MURPHY,
Executive Vice President.

AURORA, COLO., June 22, 1975.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR SIR: Hopefully you will do all that you can do to cause the House to reject the proposed regulations that pretend to be a proper implementation of Title IX of the 1972 education act.

Excessive worship of extremist sociological theories advocating total "equality" of the sexes has already gone much too far in our country. Please do not sacrifice inter-collegiate sports to the same false idol.

Sincerely,

EUGENE S. HOGAN.

[Telegram]

Representative JAMES O'HARA:

Ann Arbor, Mich.

The Commission for Women of the University of Michigan urges approval of the new title nine regulation in their entirety.

The commission is convinced that the new regulations will help to eliminate discrimination against women, and will facilitate equal access for women to a wide range of educational opportunities, including professional training, funding for higher education, access to all public school programs, and physical education and sports programs.

The Commission for Women finds that the new regulations are clearly in keeping with the intent of Congress in the 1974 amendments to the Education Act (§44 of Public Law 93-380), and will go far in ending sex discrimination. In addition, the regulations are consistent with the body of legal interpretation of title six. For a detailed discussion, please refer to paragraph 70–74 of the D.H.E.W. analysis of the regulations, published June 4, 1975 in the Federal Register.

Since the new title nine regulations are crucial to the development of equal opportunities for women, as well as consistent with the original legislation, the Commission for Women urges you to vote to approve the regulations in their entirety.

UNIVERSITY OF MICHIGAN COMMISSION
FOR WOMEN, BARBARA MURPHY,
Assistant Chairwoman.

ARIZONA STATE UNIVERSITY,
Tempe, Ariz., June 20, 1975.

Hon. MORRIS K. UDALL,
House of Representatives,
Washington, D.C.

DEAR MR. UDALL: We are extremely concerned about the potential ramifications of Title IX and the interpretations made by Health, Education and Welfare as it relates to intercollegiate sport.

The vital concern that we have would be the tremendous erosion of the mens' intercollegiate program particularly in income producing sport areas such as football and basketball. While H.E.W. states that the programs do not require equal funding, everything that I have seen to-date would mean just that. Football income is 75 per cent of the Arizona State University athletic budget. Should there be an erosion of dollars into football, we would lose a tremendous income potential and, therefore, forcing our program into a downward spiral.

While we realize you have been exposed to many pro's and con's, the only specific request that we would wish to make is that there be an impact study as to the effects of Title IX legislation on intercollegiate sport (knowing full well that intercollegiate sport by itself does not receive federal subsidy). It would seem that such a study would be in the best interest of all concerned and hopefully, there could be a moratorium placed upon the Title IX and resulting interpretations. We would be happy to give you specific information concerning the economic impacts of the regulations on the intercollegiate programs, but I believe that you have been exposed to this type of data before. Therefore, we are only asking for such an impact study and hopefully, you might assist this and other universities in seeing that such a study might be undertaken before Title IX does in fact become fully operational.

Thank you for your consideration.

Sincerely,

FRANK KUSH,
Head Football Coach.
FRED L. MILLER,
Director of Athletics.

SEPTEMBER 6, 1974.

DIRECTOR OF THE OFFICE OF CIVIL RIGHTS,
Washington, D.C.

DEAR DIRECTOR: I am writing with regard to the regulations which you have just issued to implement Title IX of the Education Amendments of 1972 (which was intended to extend Executive Order 11246/11475 forbidding sex discrimination in employment to all institutions which receive federal assistance with certain exceptions). I do not see that the proposed regulations will implement either the spirit nor the intention of the law to put an end to sex discrimination. I am an American citizen, temporarily residing in Canada, and am very concerned with this issue.

Regarding section 86.2 (O). I propose that the institution itself be responsible for and penalized for discriminatory acts of any of its subunits, and that the definition should be the unit which is largest: university, institute, college, or foundation.

Regarding subpart F, sections 86.61–86.66, I propose that a complainant should receive notice of receipt of her complaint within 10 working days; an investigation should be initiated within 60 days and completed within 3 months of filing. Findings should be published within 30 days or four months, with immediate compliance required.

Title IX exempts private undergraduate professional institutions and I urge that this exemption be dropped.

Section 86.35 (a), part 1: I support this part which prohibits single sex scholarships. However, I oppose part 2 of the same section as it exempts foreign scholarships (such as the Rhodes) from laws against discrimination on the basis of sex.

There is more. These recommendations are not originally mine but originate with the Association of Women in Science, of which I am a member. I urge you to take them into consideration.

Sincerely yours,

ABBY SCHWARZ, Ph. D.

March 31, 1975.

President Gerald Ford,
White House,
Washington, D.C.

Dear Mr. President: I am writing in regard to two particular areas of the Title IX Guidelines which you have on your desk at present. I must strongly object to the changes to the following areas:

SPORTS

These HEW interpretations were not part of the June version of the Guidelines, therefore, the public has had no chance to comment which is no way for a democratic government to be run.

The present Guidelines ignore the growing interest of girls and women in all kinds of sports in this country as well as the imperative of the law to provide equal opportunities for all students.

The intent of Title IX was to eliminate sex discrimination in educational institutions, not institutionalize it by granting permission to eliminate girls from the opportunity to participate in inter-scholastic contact sports either on an integrated team *or* a single sex team.

GRIEVANCE PROCEDURES

The grievance procedures as presently delineated are a farce leaving the complainant at the mercy of the institution.

There are no time limits to encourage the institution to come into compliance.

There is no way for anonymity to be maintained—the complainant has to go through the institution first before HEW will investigate—so different from Title VII of the Civil Rights Act which permits investigation without revealing names. Why are female students and faculty members denied this protection?

I urge you to do everything in your power to strengthen these Guideline areas. Please do not sign them off in the condition they are presently in.

Respectively yours,

Anne M. O'Donnell,
President, Copper Country Chapter,
National Organization for Women.

Iowa State University,
Department of Intercollegiate Athletics,
Ames, Iowa, June 24, 1975.

Hon. John Culver,
Senate Office Building,
Washington, D.C.

Dear Senator Culver: I wrote to you recently and stated that the athletic directors and coaches, not only in our state, but in every state in the Union, are deeply concerned with the impact which the new regulations HEW would impose on colleges and universities in the United States.

1. The regulations which HEW would impose on colleges and universities under the pretext of eliminating sex-discrimination will place intercollegiate athletics under the full control of the Federal Government. HEW and its examiners will have the authority to dictate to each college:

the kinds of athletic programs which the college must offer;

the manner in which the funds for intercollegiate athletics may be expended;

the conditions under which the college may accept and use donated funds; and

the number of athletically related scholarships to be awarded to students of each sex.

2. HEW's regulations demand the impossible by requiring separate but apparently identical athletic programs for the two sexes without regard to the income-generating potential of certain sports and the HEW regulations ignore the differences among sports based upon student, faculty, alumni and general fan support.

3. If the Federal government, through HEW, demands equal programs regardless of the need, costs or income sources, then the Federal government should provide the funds to pay for the government-mandated expenditures.

4. HEW has not undertaken any valid study as to the added costs these regulations will impose upon the institutions of higher education, much less an economic impact study to ascertain whether the net effect will be less income for intercollegiate athletics and, thus, less money to finance programs for female students.

5. Efforts to comply with these regulations will seriously, if not fatally, damage the income potential of such college sports as football and basketball or force the financing of these programs to agencies completely outside of the institution. In either event, the facilities and other sports of an institution dependent upon the income from football and basketball will suffer, along with opportunities for female participation.

6. HEW's regulations, simply and tragically, are not responsive to the financial and social realities of intercollegiate athletics. Congress must reject these regulations and adopt legislation which would:

Declare a moratorium on the application of HEW's rules to intercollegiate athletics during which HEW would be directed to study and report to Congress regarding (a) the need for such rules in light of the voluntary action being taken by colleges, and (b) the impact of the rules on all facets of intercollegiate athletics and, in turn, the financial structure of the respective colleges and universities; or, at the very least—provide that income produced by a particular sport may be used to cover the expenses of conducting that sport without regard to any program-balancing requirement imposed by HEW regulations.

There is no way to equate a women's program with college football, and we ask the Congress, through amendment or through direction to HEW, to make it clear the revenue generated by a sport (men's or women's) may be retained by that sport to the extent necessary to support it. Better yet, exempt completely from Title IX educational programs receiving no Federal financial assistance.

Thank you again for your interest. The future survival of intercollegiate athletics depends upon you and your colleagues. I earnestly solicit your support.

Sincerely yours,

LOU MCCULLOUGH,
Director of Athletics.

NATIONAL ORGANIZATION FOR
WOMEN OF NEW JERSEY,
Verona, N.J., April 15, 1975.

The PRESIDENT OF THE UNITED STATES,
Washington, D.C.

DEAR PRESIDENT FORD: As State Coordinator of the National Organization for Women of New Jersey, I am writing to protest the athletics section of the Title IX Regulations. The vicious circle that shuts women and girls out of athletic development and participation must end.

The provision that schools may have one single sex team for such "contact sports" as basketball or baseball is unconscionable in the light of recent efforts to open up participation in the Little League. What can reasonably be said to a young woman who wants to play basketball, whose brother plays basketball with the aid of school funds, facilities, and coaches?

Under the Title IX Regulations, she cannot even hope that institutions will be required to provide affirmative action efforts in the way of special support and training to offset her limited athletic opportunities in the past. She cannot hope for prompt action to remove discrimination because there are no time limits set within the grievance procedures.

We urge you to act positively to amend the sections of the Title IX Regulations which exclude girls/women, perpetuate past discrimination, and place obstacles in the path of girls/women who seek equal opportunity for physical as well as mental development.

Yours truly,

JUDITH S. KNEE,
State Coordinator.

FLAGLER COLLEGE,
St. Augustine, Fla., April 7, 1975.

Hon. BILL CHAPPELL,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN CHAPPELL: I am enclosing for your consideration a copy of a recent resolution adopted at the annual meeting of the American Association of Presidents of Independent Colleges and Universities. It is my hope that you will give serious attention to this matter, for the continuing instrusion of Federal Agencies in the governance and operations of private institutions of higher education poses a grave danger to the historical freedom of the private sector.

With kind regards and best wishes, I am,

Cordially,

William L. Proctor,
President.

Texas Lutheran College,
Seguin, Tex., June 13, 1975.

Hon. James O'Hara,
House of Representatives,
Washington, D.C.

Dear Congressman O'Hara: It is my understanding that your subcommittee on Post Secondary Education will soon hold hearings on the Title IX guidelines on sex discrimination.

I wish to call your attention to one aspect of the guidelines which would work an extreme hardship on our college (and many others I am sure). It is my understanding that colleges will have three years in which to comply with those parts of the guidelines relating to physical activity courses and inter-collegiate athletics—and that seems to me a reasonable period for making this transition. However, for one aspect of intercollegiate athletics—athletic scholarships, it is my understanding that there is to be no such three-year transition period but that equal scholarships must be given to men and women athletes beginning this fall.

What I am requesting is that colleges and universities be given a three-year period of adjustment in the area of athletic scholarships also. This would allow us time to honor commitments which have been made to male athletes, time to seek additional funds for women's athletes, time perhaps to reduce the total male athletic scholarship program so that funds would be available for women also.

The athletic scholarship program for men at Texas Lutheran College has developed slowly and carefully for two or three decades. This occurred during the time that national women's athletic organizations were prohibiting scholarships in women's collegiate athletics. Scholarship gifts from friends of the college and gate receipts have made a large scholarship program possible. In a time of inflation and extremely hard times for higher education, to expect a private college to duplicate its men's athletic scholarship program for women by this coming fall seems unreasonable compared to the other more reasonable section of the Title IX guidelines.

Thank you for your consideration of this request.

Sincerely,

Joe K. Menn, *President.*

San Antonio, Tex., *June 11, 1975.*

Dear Representative James G. O'Hara: Please vote no on the new HEW regulations regarding equal "necessary funds" that must be available for women sports. I feel that this would seriously hamper many sports programs as they are now enjoyed as all but two, football and basketball, are already totally nonprofitable. However, most of all I object because it is, again, just another governmental control over our personal lives!

Thank you.

Yours truly,

Miss Margaret M. O'Brien.

Women's Equity Action League, Michigan Division,
Ypsilanti, Mich., June 23, 1975.

Hon. James G. O'Hara,
House Committee on Education and Labor,
House of Representatives,
Washington, D.C.

Dear Mr. O'Hara: On behalf of the Women's Equity Action League of Michigan I am writing to urge you to endorse Title IX Regulations. If there are no regulations, there will be no enforcement. A vote to disapprove the Title IX Regulations would be a vote against equal opportunity for women in education.

Sincerely,

Bette C. White,
Executive Board, W.E.A.L.

Illinois Office of Education,
Springfield, Ill., June 24, 1975.

Hon. James O'Hara,
Chairman, Postsecondary Education Subcommittee of the Education and Labor Department, House of Representatives, Washington, D.C.

Dear Congressman O'Hara: I regret that I cannot appear before the Subcommittee to testify on the Title IX Guidelines. However, I would not want to lose this opportunity to share some of my concerns with the Committee.

In general, the Regulations have my support, and I look forward to seeing these Regulations effected. There are, however, five areas which I feel need to be strengthened.

Section 86.3 addressing "Remedial and affirmative action and self-evaluation" contains no provision for the prevention of discrimination in hiring through affirmative action planning. Further, although educational institutions are required to perform a self-evaluation, they are not required to file their report with the Director. The language of this section lets an educational institution defer action until the Director determines that discrimination has occurred.

I cannot support Section 86.15 exempting private undergraduate institutions with vocational and professional programs from non-discriminatory admission policies. Under this exemption, these institutions are free to employ quotas based on sex as part of their admission policy. It would certainly be destructive to offer non-discriminatory opportunities to students in elementary and secondary schools only to discriminate at the college level. We are being hypocritical if we allow some institutions to set differing entrance requirements based on school averages or entrance exams in order to control the numbers of each sex to be admitted to an institute of higher learning. Three courses of study that immediately come to mind as "controllable" by sex are engineering and architecture (for females) and early childhood and elementary education (for males).

I most certainly agree that specific textbooks and classroom materials should not be mandated at the Federal (or State) level. Nor should any recipient be obligated to purchase new texts and materials to prevent sexism in the classroom. However, it is possible for educational institutions to adapt their existing texts and *use* the stereotyping to *overcome* sexism. This is merely one possibility for achieving the purposes of these regulations without imposing censorship.

In the area of physical education in secondary schools, I do not believe it is necessary to extend more than one year's time to meeting compliance standards. Secondary institutions should not be granted three years unless they can demonstrate compelling financial reasons for not meeting this provision within one year.

Finally, I would like to see some assurances that compliance procedures will be closely monitored. There is no need to debate or put into effect these regulations if enforcement is not forthcoming.

The Illinois Office of Education stands ready to assist the school districts in our state to meet the provisions of these Regulations.

Thank you for inviting me to address you on this issue.

Sincerely,

Joseph M. Cronin,
State Superintendent of Education.

Seton Hall University,
South Orange, N.J., June 20, 1975.

Hon. James G. O'Hara,
Chairperson, Subcommittee on Postsecondary Education, Committee on Education and Labor, Cannon House Office Building, Washington, D.C.

Dear Mr. O'Hara: The Committee of Women Administrators at Seton Hall University has asked me to contact you in reference to the Proposed Title IX Regulations. Our concern stems from sections of the Regulations which do not promote equitable and quality athletic programs for all students.

We recommend the following changes:

1. That an institution be required to undertake affirmative efforts to provide special support and training for women.
2. That comparable funding be required to be made available to assure the development of women's athletic programs.
3. That separate teams be required for men and women irregardless of status in terms of revenue producing or contact.
4. That equal opportunity exists in the area of financial aid for student athletics.
5. That institutions of higher education be required to comply within a one year period specifically designated by the Department of Health, Education and Welfare.

It is our hope that these concerns will be carefully considered by your committee and appropriate action taken. Thank you for your time and consideration.

Sincerely,

SUE DILLEY,
Assistant Director of Athletics.

[Mailgram]

NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS,
Elgin, Ill.

Representative JAMES G. O'HARA,
House of Representatives,
Washington, D.C.:

The National Federation, which represents 22,000 high schools through its member high school association in each State, opposes section 86.41 of the regulations to effectuate title IX of the 1972 Education Amendments and urges you to introduce or support a resolution of disapproval.

The section is both illegal and unwarranted.

Title IX forbids sex discrimination in education programs which receive Federal financial assistance, athletics do not, but HEW has included athletics in 86.41 in disregard for the letter of the law and intent of the Congress.

Schools have taken great strides to provide equal opportunity for boys and girls to participate in interscholastic athletic competition. We do not feel Federal regulations will further stimulate opportunities for girls, but rather cause confusion, frustration and expense for schools.

We believe it is time for the line to be drawn on government involvement in our programs. By rejecting 86.41, you will do this.

CLIFFORD B. FAGAN,
Executive Secretary.

MICHIGAN STATE UNIVERSITY,
East Lansing, Mich., June 18, 1975.

Representative JAMES G. O'HARA
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE O'HARA: Tom Hansen of the NCAA has been quoted as having said, "Our members are terribly disappointed and surprised." Please understand that the NCAA is totally male and women are excluded. Also, the NCAA with single sex representatives is planning NCAA tournaments for women. Of course, his members are disappointed and surprised to find that the federal government only can be a catalyst for opening up sport for women too.

The spirit and intent of Title 9 will help women gain an opportunity to participate in sport. In total, I feel Title 9 is weak, but I also recognize the strength of men's intercollegiate sport and the emotional reaction to the inclusion of women.

I am sure that men's sport will not be destroyed by women's full participation. The genius and expertise men have exercised in making men's sport a cultural phenomenon will now be extended to serve women too. This will do wonders for the hundreds of men in middle management posts that need more to do.

I look forward to testimony from women about women. Also, if you have a woman on the committee for post secondary education, please be sure she recevies a copy of this letter.

My very best regards to you and your committee.

CAROL HARDING,
Director, Women's Intramural Sports
and Recreative Services.

Enclosure.

GROWTH OF WOMEN'S INTRAMURALS AT MICHIGAN STATE UNIVERSITY

	1962-63	1963-64	1964-65	1965-66	1966-67	1967-68	1968-69[1]	1969-70	1970-71	1971-72	1972-73	1973-74
Total number of participations in the informal, recreational use of the intramural building	2,000	7,271	8,260	8,400	9,200	13,480	52,779	90,618	122,217	150,598	165,725	162,083
Total number of participants in intramural scheduled competition	2,515	2,335	2,538	2,496	2,420	2,378	1,860	2,301	2,906	3,202	4,630	3,876
Pieces of equipment issued	1,400	2,352	9,190	11,354	12,342	15,890	[2] 12,622	22,155	31,493	37,109	[3] 34,177	30,416

[1] 1st year for being opened during the summer session (5 weeks).

[2] Reduced equipment figure due to separation of physical education and intramural equipment.

[3] Discontinued suits and caps on sign-out basis.

UNIVERSITY OF DELAWARE,
Newark, Del., June 4, 1975.

President GERALD FORD,
The White House,
Washington, D.C.

DEAR PRESIDENT FORD: We, involved in women's intercollegiate athletics at the University of Delaware are deeply concerned over the current draft of the Title IX Regulations. We feel that there are several items which will not serve the best interests of women's athletics.

We are opposed to the wording of the section which allows an institution to offer just one single-sex team in contact sports. Although recent clarifications indicate that the intent is to offer teams for men and women when there is sufficient interest, we feel that the wording could be construed for the purposes of administrative and budgetary ease to curtail or eliminate certain women's activities, even when interest is present. We strongly feel that separate teams for men and women, in both contact and non-contact sports, should be specified by the Regulations. While we see much value in the co-ed team concept, where particular numbers of males and females are designated and where rules ensure equal participation, we see this as a desirable addition to a firm foundation of separate men's activities and women's activities.

A second area of concern is the elimination of the interest determination. While we felt that an annual polling of students was not practical, we agree with the principle of student involvement and consideration of student needs and interests in developing athletic programs. According to the *Regulations*, this is no longer deemed important.

The grievance procedure section appears to have the potential to indefinitely delay the resolution of a conflict or lack of compliance. Since there is no time limit specified for individual institutions to complete the internal grievance process before the issue goes to the Department of Health, Education and Welfare, it is conceivable that the matter might be tied up within the institution for a very long period of time and thereby obviate the intention of the grievance procedure altogether.

The elimination of the affirmative efforts section is also a cause for concern. We feel that this section, in the June 20 version of the *Regulations*, clearly spelled out one method for attaining equality in athletic programming between the sexes. Its elimination in the current draft leaves this process to chance and increases the possibility that the equalization process will be much prolonged.

There is also some concern over the three year compliance period. We feel that this may allow some institutions to maintain the status quo during this entire period. Recognizing that this period may be necessary for some institutions to comply, we feel that perhaps an additional stipulation stating that process toward equalization of opportunity in athletics for men and women must be demonstrated within one year and must be completed within three years, is needed.

Most importantly, our overriding concerns are that women's athletic programs not be forced into a carbon copy of existing men's athletic programs and that the individuals who are currently involved in women's athletic programs be allowed to maintain the administrative responsibilities for the development of their programs in the ways that they deem to be in the best interests of women's athletics. We feel that both of these crucial principles are being strongly threatened currently.

As a member institution of the Eastern Association for Intercollegiate Athletics for Women and the Association for Intercollegiate Athletics for Women, we support the position statements made by both organizations, which have been presented to you.

We strongly urge you to take action to strengthen in the best interests of women's athletics, the Title IX Regulations as they are currently written.

Respectfully yours,

MARY ANN HUTCHENS,
Coordinator of Women's Athletics.

UNIVERSITY OF NORTHERN IOWA,
Cedar Falls, Iowa, June 5, 1975.

The Honorable JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR MR. O'HARA: I have enclosed a copy of original letter sent to President Ford on May 29, 1975.

As a member of the Subcommittee on Postsecondary Education, I believe it is pertinent that you have a copy.

Sincerely,

STAN SHERIFF,
Athletic Director,
Head Football Coach.

UNIVERSITY OF NORTHERN IOWA,
Cedar Falls, Iowa, May 29, 1975.

The PRESIDENT,
The White House,
Washington, D.C.

DEAR MR. PRESIDENT: Very likely you will never personally read this letter; however, I am in hopes it will reach someone on your administrative team that can get the message across as to some of the severe ramifications of the passage into law of Title IX legislation as now written.

Those of us in athletic administration definitely support the continued and orderly growth of women's intercollegiate athletics. Institutionally, we have made many strides in our attempt to upgrade our women's programs without eroding the financial support of the men's intercollegiate programs.

I would suggest three basic revisions in the proposed legislation:

1. In order to combine application of the regulations to federally funded programs, delete (or benefits from) from section 86.11, and any further comparable provision of this regulation.

2. In order to recognize that program differences reflecting revenue-producing ability are not sex based differences, and to prevent erosion of an important source of financial support for intercollegiate programs, amend the final sentence of Subsection 86.41(c) to read as follows:

> "Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams, if a recipient operates or sponsors separate teams, will not constitute non-compliance with this section, *nor will differences in expenditures or programs resulting from the allocation of self-generated revenues to the teams concerned constitute such non-compliance*, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for member of each sex.

3. In order to eliminate the sex test for athletic scholarships, strike Section 86.37(d)(1), and everything following the word "paragraph" in present Section 86.37(d)(2).

Unless these suggested revisions become part of the final draft, government intrusion will find its way into the management of individual colleges and universities. HEW's improper extension of the law reaches beyond those programs of an institution which receives federal funding to embrace each and every program of the institution, including intercollegiate athletics for which we receive no federal financial assistance. The regulations are directed to requiring that the total expenditures for men's and women's sports are equal, regardless of income potential of the respective sports and additional donor support. The regulations are a major assault upon the revenue producing potential of men's intercollegiate athletics. They do not recognize the need for increased expenditures for those sports which attract the greater attendance.

Institutional management must be free to determine the expenditure commitment's for various sports, dependent upon student participation, student body spectator interest and general fan support.

The sex test for athletically related scholarships are ambiguous and apply, presently, only to athletically related aid. This section should be eliminated. Section 86.37(d) requires awarding athletic grant-in-aid on the basis of sex as opposed to the basis of ability. This regulation is intended to eliminate sex discrimination. If HEW would be consistent in its interpretation of the regulations, the same treatment of scholarships in nursing and engineering should be so prescribed. The obvious counterproductivity of such a situation in nursing was apparent even to HEW, but HEW feels it is appropriate in athletics.

We believe the only appropriate test on scholarships is whether they are awarded without sex discrimination.

I urge you to seriously consider the suggested revision in the final draft to Title IX regulations. I am firmly convinced that the revisions would not deter the development of a sound program for women. In fact, our women's softball team was the runner-up in the national softball tournament held this past weekend in Omaha, Nebraska. We have increased our sports offerings for women in the past year from four activities to eight sports.

We are on the correct path in the development of women's athletics and we are not doing it at the expense of the already established men's program.

Please give my request serious consideration.

Sincerely,

STAN SHERIFF,
Athletic Director,
Head Football Coach.

LOUISIANA TECH UNIVERSITY,
INTERCOLLEGIATE ATHLETICS,
Ruston, La., June 18, 1975.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

MY DEAR MR. O'HARA: First, let me say that as Athletic Director at Louisiana Tech University, I am not against womens athletics; we presently have several intercollegiate athletic teams for these young ladies. I must, however, for the survival of the athletic programs at our institution and those all across this great nation, speak out as strongly as I can against HEW's interpretations in Title IX stating what we must do in our programs if we are to continue to receive Federal money.

It is impossible for me to believe that these interpretations were meant to be a part of the original Title IX draft; I say this because I do not believe the draftees intended to destroy college athletics as we now know them. This will most assuredly happen if the Title IX implementation regulations become law on July 21, 1975. These regulations, simply and tragically, are not responsive to the financial and social realities of intercollegiate athletics.

We should all hope, particularly at this time, that no legislation be passed without the full realization of all its ramifications. This scrutiny must be applied to Title IX because I personally believe that intercollegiate athletics have played an important part in the history of our nation and is today part of our American heritage.

Many athletic departments today are operating in the "red," and HEW's regulations would impose a tremendous hardship on some and would be the death knell of many others. It would be an impossibility for most universities to fund an athletic program for women that would be comparable to the mens programs as we now have them. We are presently, and have been for several months, operating several areas of our department on moneys received from outside sources. And for HEW to say, at a time when costs are spiralling, that we must almost if not double our expenditures, is asinine and unrealistic.

The NCAA, conferences, institutions and athletic directors are continuously searching for ways to reduce costs in athletics and still keep a program which is attractive to the paying public, for without them there would be no program. The NCAA has called a special meeting in Chicago on August 14–15 (only the second time in history) for this specific purpose. Some items to be discussed are fewer scholarships, limited number of coaches, less scouting, less recruiting, devaluation of scholarships, limiting the size of traveling squads, and many other things.

I respectfully urge you to please consider the plight of all our universities and reject HEW's Title IX regulations and return them for an in depth study on the impact it would have on American athletics. This is necessary for our survival and should be done because practically every school in the country is doing something for women's athletics on their own volition, and this is just a beginning.

Sincerely,

MAXIE T. LAMBRIGHT,
Athletic Director.

LOYOLA UNIVERSITY OF CHICAGO,
Chicago, Ill., June 16, 1975.

Congressman JAMES G. O'HARA,
House of Representatives Office,
Washington, D.C.

DEAR CONGRESSMAN: Will make this note short. Please vote to send Title IX back to H.E.W. for a detailed impact study. Otherwise, our whole program, both men and women, will go down the drain.

I have been a coach and a teacher for 35 years; my intentions are not selfish.

Best wishes,

GEORGE M. IRELAND,
Director of Athletics.

[Telegram]

Congressman JAMES G. O'HARA,
Rayburn House Office Building,
Washington, D.C.:

Vote no on title 9 legislation to keep college athletics alive.

CHARLES (LEFTY) DRIESELL,
Head Basketball Coach,
University of Maryland.

DURHAM, N.C., *June 16, 1975.*

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: With regard to current legislation before your House Post-Secondary Education Subcommittee regarding funding for male and female athletics at universities, I feel that it is important to clarify a few points which have been clouded over. While recreational athletics should be open to students of both sexes, hopefully utilizing the same programs instead of separate sexually segregated programs, in order to avoid any of the bias abhorrent to the American tradition, I feel that to spend equal funds, either *en bloc* or *per capita* on separate male and female competitive athletic programs, would be a denial of constitutional rights to male student-athletes for the following reason. As a general rule, female athletes do not perform as well as males (taking an example from my own experience, as a mediocre 11th grade half miler I could easily beat the female world record in that event), and to award a female runner or other athlete financial support and access to facilities which would not be available to a mile athlete with equal, or even superior ability, would be a denial of the rights of the male athlete on the basis of sex alone. Such blatant discrimination must not be countenanced.

Sincerely,

DAVID S. SHIMM.

KINGSTON, N.Y., *June 18, 1975.*

DEAR CONGRESSMAN O'HARA: Title IX regulations insure equal opportunity for girls and boys—and implicitly downgrade commercial money making aspects of sports.

We all need this change in emphasis to become a more creative people. Support Title IX.

JACK GROGAN.

FLAGLER COLLEGE,
St. Augustine, Fla., June 20, 1975.

Hon. JAMES O'HARA,
House Postsecondary Education Subcommittee,
House of Representatives, Washington, D.C.

DEAR REPRESENTATIVE O'HARA: On Thursday, the 5th of June at approximately 4:30 p.m. I met with two officers of the Federal Bureau of Investigation. They were pleasant and cordial and were responding to instructions from the Justice Department to investigate dormitory regulations for female students at Flagler **College. You may not be aware that Flagler College is a small, private institution** and 96% of all federal funds received are administered by the Celleg in the **form of financial aid to students. The aid is awarded without regard for race, sex or religion.**

I was informed that we were being investigated under Title VIII of the 1968 Civil Rights Act, however, I suspect the inquiry was predicated on the assumption that Congress would not object to the proposed regulations issued by HEW in regard to Title IX of the Education Amendments of 1972. The kindest thing that can be said about the regulations is best expressed in the words of Senator Jesse Helms to the effect that **"HEW's rules for the Title IX Sex Discrimination** provisions are so erroneous and inconsistent with the law it would be simpler **to scrap them and write another set of regulations than to try to revise them."**

My own opinion is more in line with that expressed by Mr. Patrick J. Buchanan in the attached article entitled "Jackassery." The expertise of HEW in regard to educational matters is best documented by the recent research of Grace Bress, **a Woodrow Wilson Fellow at Harvard University and that of Biloine Whiting, a former English instructor at the University of Illinois. Their report "concludes** that busing has neither raised the achievement levels of black children nor has **it diminished racial tensions."**

In light of Senator A. Ribicoff's recommendation that the FBI assume responsibility for federal drug law enforcement and considering the present crime wave that engulfs our country the asininity of my Thursday afternoon meeting defies the comprehension of rational men.

In closing, may I suggest that Title IX regulations are beyond repair. Their relationship to the original legislation is at best circumstantial, hence I urge your efforts to insure that Congress does not permit these regulations to go into effect. Their adoption will ensnare public and private education in an unsurpassed bureaucratic morass.

With kind regards and best wishes, I am,

Cordially,

WILLIAM L. PROCTOR,
President.

Enclosure.

[Sentinel Star, June 10, 1975]

"JACKASSERY"

(By Patrick J. Buchanan)

WASHINGTON.—The New Majority may have swept 49 states in November of 1972. But over at HEW the "new politics" of Mr. McGovern is still calling the tune. That is the only conclusion to draw after looking over the latest rules and regulations produced by those same wonderful people who gave us the racial quota and forced busing.

Sexism in education is the latest foe of Big Brother. And the newest guidelines for its elimination represent the largest cave-in to date by the Republican administration to a raucous, militant minority of feminists seeking to impose its own idea of "equal rights" upon a nation which, by and large, views them as a collection of bizarre busybodies.

Under the new rules, all physical education classes in grammar school and high school must be sexually integrated. While the wrestling and boxing teams need not, schools are henceforth to provide equal funds, scholarships, travel budgets, opportunities, coaching staffs and locker room facilities for male and female. As for the home economics and baking classes, and body and metal shop, they are not only to be open to both sexes, but HEW will look suspiciously on any class with a preponderance of one sex.

The ladies of women's liberation may deplore this state of affairs to the heavens; but that is the way it has been in this free society. And every other civilized society in history. There is nothing objectionable about women wanting to attempt the same challenges and occupations and enterprises as men. What is outrageous, however, is for a minority, using its leverage with a like-minded bureaucracy, to impose their concept of "equal rights" upon every single school in the nation.

HEW's new rules and regulations establish a whole new set of "rights" for which taxpayers are going to have to provide millions of dollars. They are based upon a concept of "equality" of the sexes which exists only in the minds of abstractionists and zealots.

And the consequence of these new guidelines is going to be a raft of law suits by interfering feminists, against a good many of the school systems in the United States.

Again, what is tragic is that there has been a geometric increase in this jackassery at HEW, ever since the Republicans were elected in office in 1968. One wonders how President Ford goes about squaring these latest federal decrees with his rhetoric about too much control and interference from the federal government in Washington?

The most immediate howls have come from the athletic departments of the nation's major colleges and universities.

Understandably so. At schools like Ohio State and Maryland, it is the huge expenditures for football and basketball programs, which return the enormous revenues that carry the rest of the athletic program. HEW's orders will now force deep slashes in existing programs to establish new ones for the women, for which there may be neither demand nor need.

There are fellows in high schools and colleges who may be whizzing at baking souffles. And there may be some campus cuties whose idea of a good time is hitting the tackling dummies in spring training. But let us face reality. These are the exceptions; often they are the eccentrics. The majority of men in college today are going to be working and supporting families; the majority of women are very probably to be home much of the day raising their families.

COLORADO SPRINGS, COLO., *June 18, 1975.*

Hon. JAMES G. O'HARA,
Washington, D.C.

DEAR SIR: I am greatly concerned that the proposed rules HEW has developed to achieve complete male/female equality in sports. In my opinion, the bureaucrats (dedicated civil servants) in their zeal to cover all aspects of the problem have gone too far in development of rules to implement the law.

The law was not intended to violate the psysiology of the average normal woman. Male/female competition in sports is inimical in the development of ruggedness in the male and ignore the God-designed softness and lower muscle mass in the female. Further, government dictation of the degree of sexual mixing in sports and complete equality of facilities will contribute to role confusion and deepen the identity crisis already experienced by our youth.

The HEW rules go to the ridiculous extreme and are based on an error in judgment as to the desires of the majority of women in our country. In other words, HEW is indulging in a bit of Empire building in response to a vocal minority of women.

I believe it to be the responsibility of Congress to bring reason to action proposed by the bureaucrats. Please vote against the action proposed by the bureaucrats. Please, vote against the HEW rules and send them back with instructions to "tone them down."

Sincerely,

DOUGLAS C. CONLEY.

WASHINGTON, D.C., *June 20, 1975.*

DEAR CONGRESSMAN O'HARA: Equal opportunity must be provided in all aspects of higher education if our national ideals are to be met. I hope you and your fellow congressmen will call for prompt implementation of HEW's Title 9 regulations.

College athletics should not be exempted, in my view, from compliance with the regulations. As a former college newspaper sports editor and a current college booster club member. I believe strongly that athletics have a positive role to play in everyone's, men's or women's, lives. However, I do also think that altogether too much public attention is being given the athletics section of the regulations at the expense of the other sections.

Sincerely,

RUSSELL L. POWER.

ALPHA LAMBDA DELTA,
June 22, 1975.

Hon. JAMES G. O'HARA,
Chairman of Subcommittee on Postsecondary Education of Committee on Education and Labor, House of Representatives, Cannon House Office Building, Washington, D.C.

DEAR MR. O'HARA: The National Council of Alpha Lambda Delta wishes to have inserted in the record of the hearing on the Title IX Guidelines the following statement: We do not feel it was the intent of Congress in passing the Education Amendments of 1972 to eliminate single sex honor societies.

Alpha Lambda Delta, honor society for freshman women, performs a valuable service for young women today. The organization believes that its mission can be carried out most effectively by remaining a women's organization. In this manner we can also perform an affirmative action function for higher education.

Alpha Lambda Delta was founded 51 years ago and has 190 chapters, located through the United States, 165,636 young women have been initiated into the society. Our purpose is . . . "to encourage superior scholastic attainment among women in their first year in institutions of higher education, to promote intelligent living and a continued high standard of learning, and to assist women students in recognizing and developing meaningful goals for their unique roles in society."

As a part of our national program to encourage young women to develop to their fullest potential and to prepare for their expanding roles, eight fellowships of $2000 each are given each year to assist Alpha Lambda Delta members in obtaining graduate degrees.

This is but one example of the way Alpha Lambda Delta assists women to pursue their goals in higher education. We believe that forbidding institutions to recognize or to work with single sex societies was not the intent of Congress and that such a decision would set back women's programs immeasurably.

The Council, made up of women from universities across the country, women who have devoted their professional lives to working for the advancement of women, urges you to make possible the continuation of single sex honor societies such as Alpha Lambda Delta.

Sincerely yours,

KATHARINE C. CATER,
President.

[Telegram]

LUBBOCK, TEX., *June 24, 1975.*

Representative JAMES G. O'HARA,

Vote "No" on title 9 to keep athletics as it is now.

GERALD OGLESBY,
Head Track Coach,
Texas Tech University, Tx.

[Telegram]

LUBBOCK, TEX., *June 24, 1975.*

Representative JAMES G. O'HARA,

Vote "No" on title 9 to keep athletics as it is now.

GERALD MYERS,
Head Basketball Coach,
Texas Tech University, Tx.

GOVERNOR'S COMMISSION ON THE STATUS OF WOMEN,
MONTPELIER, VT., *June 19, 1975.*

Representative JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: The Vermont Governor's Commission on the Status of Women supports the HEW Regulations for Title IX as was recently signed by President Ford.

These regulations will implement Title IX of the 1972 Omnibus Education Act and it is imperative that the guidelines be approved. Equal treatment for women in education has been a long time coming. It is overdue and necessary to permit girls and women the opportunity for full development of all their skills.

We urge your sub-committee on post-secondary education to endorse these regulations.

Thank you.

Sincerely,

CONSTANCE L. KITE,
Executive Director.

UNIVERSITY OF MASSACHUSETTS,
DEPARTMENT OF ATHLETICS,
Amherst, Mass., June 23, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, Cannon House Office Building, Washington, D.C.

DEAR MR. O'HARA: I would like to request an opportunity to appear and testify before the Committee on Title IX.

Truly, I find it deplorable that equal opportunity for women must be legislated. But, that is the way of our society. Therefore, I support equal opportunity legislation, especially Title IX and the section which deals with athletics.

The female's experience with sport has been vicarious, to say the least. Even worse since learning does occur through vicarious experience, the female learned a role, one that excluded the necessary traits for success as a person, that made her play a subservient role in society. She learned dependency on the males, never that she could provide for herself.

Today athletics and sport in an educational environment perpetuates this concept of dependency. Why even here at one of the great land grant institutions in New England, where female students pay almost 50% of the athletic fees, equality for women may be based on the availability of new revenues! At present, approximately less than 8% of $1,159,142 budget goes to women and the future does not seem much brighter.

Dollars, though, are only a symptom of the diseases—the cause lies another place.

If athletics are a part of education then they are as educational for women as they are for men.

Sincerely,

VIVIAN M. BARFIELD, Ph. D.,
Assistant Director of Athletics.

[Mailgram]

ANN ARBOR, MICH., *June 17, 1975.*

Representative JAMES G. O'HARA,
House Office Building,
Washington, D.C.

Kid wrestler Tricia McNaughton age 9 has placed in all but one tournament entered this year and has 36–8 record National AAU refuses to let here enter Junior Olympics wrestling tournament on grounds that it is for boys only. This can happen under Title 9 guidelines. Help.

JAMES and CAROL MCNAUGHTON.

DRS. RANSON & RITCH., P. A.,
Charlotte, N.C., June 18, 1975.

Congressman JAMES G. O'HARA,
Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I understand that the Title 9, Prohibition of Sex Descrimination (86.38 Athletics) recently was signed by President Ford is now before a House Sub-Committee on Education for consideration.

I hope that you will use your influence to see that the portion of this bill that pertains to intercollegiate athletics is defeated because:

(A) If athletic departments of the major colleges and universities are forced to equalize expenditures for men's and women's sports regardless of the income potential of the respective sports, football and basketball, their only major revenue sports will drop to a low level. This will, in effect, force marked de-emphasis or abandoning of sports at the college level at a time when many people are concerned about the United States' showing in Olympic, as well as other international events.

(B) The intercollegiate athletic departments received no federal financial assistance and for this reason should not be subjected to these guidelines. I feel that this is an improper extension of the law by H.E.W. reaching beyond those programs of our institutions which receive federal funding.

For the above reasons, I hope you and your Sub-Committee will use all of your influence to see that this portion of the law is not allowed to take effect to cause irreparable damage to college athletics which, as you are aware give many of our citizens a great deal of enjoyment.

Sincerely yours,

DOUGLAS L. RITCH, M.D.

BAYLOR UNIVERSITY,
Waco, Tex., June 18, 1975.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: The President approved the HEW draft of the Title IX regulations on May 27 and sent them to Congress for its approval by July 21. I urge you to vote against such approval.

I believe the federal regulations should be restricted just to educational programs which receive federal aid and not to entire school systems. Under the HEW interpretation, if one student on the GI Bill attends a university with 10,000 students, the whole university with all its programs and schools is subject to federal regulation. As one educator put it: "The federal government has furnished the thread to sew on a button and demands the right to design the whole suit."

Particularly onerous are the regulations concerning intercollegiate athletics, which in many cases might be called an unrelated business conducted by some universities for the amusement of alumni and local citizens. This business will likely be destroyed by these regulations under which bureaucrats will inevitably require the same expenditures on women as men's sports. The regulations should allow the revenue produced by a sport to be spent on that sport.

I hope you will use your influence in Congress in an effort to bring about these changes.

Sincerely,

ABNER V. MCCALL, *President.*

WESTMINSTER COLLEGE,
New Wilmington, Pa., June 12, 1975.

GARY A. MYERS,
Congress of the United States,
House of Representatives,
Washington, D.C.

DEAR MR. MYERS: The Tuesday, June 3, 1975, edition of the Pittsburgh *Press* carrier a lead story entitled "U.S. Orders Sexually-integrated Gym Classes." One of the highlights of the article was the following paragraph:

"Social fraternities and sororities at colleges receiving federal aid are exempt from the regulation, but other groups such as business and professional fraternities and sororities and honor societies at schools and colleges may not discriminate by sex."

I understand from this article that this ruling must be passed by the Congress. Therefore, I am writing to you to urge you to exclude honor societies from this particular ruling.

As a student personnel dean I have been associated with such women's groups as *Cwens and Mortar Board*, the honor societies for sophomore and senior women, respectively. I feel that these groups have an identity of their own and do much to help educate women outside the formal classroom situation. I do not feel that these groups would accomplish the same purpose if there were both men and women in them.

Certainly if social sororities and fraternities are permitted to maintain their segregation, I feel this should be the same situation with honor societies—whether they be honor societies for women or honor societies for men.

I shall be more than happy to answer any questions you may have concerning this matter. Thank you so very much for your attention.

Sincerely,

Lorraine A. Sibbet,
Associate Dean of Students.

San Jose State University,
San Jose, Calif., June 20, 1975.

Hon. James G. O'Hara,
Subcommittee on Postsecondary Education, Committee on Education and Labor, Cannon House Office Building, Washington, D.C.

Dear Representative O'Hara: First, let me make it clear to you that while I am writing to you in my capacity as the administrative officer responsible for the budgeting and oversight of all academic programs, including intercollegiate athletics, I am not relaying to you an official University position but, rather, offering my best professional judgment about the likely effects of Title IX at this University if the Congress approves the regulations as written by HEW and signed by President Ford.

I have but one concern and therefore one request: my concern is that the Congress not put this University in a position where its programs in intercollegiate athletics for men and women may have to be reduced or eliminated, and my request is that you and your colleagues amend Title IX to exempt the major revenue producing programs in intercollegiate athletics (football, basketball) from the requirements of Title IX. Apart from that reservation I am in full support of the spirit and intent of Title IX.

My reason for this petition to you and your colleagues in the Congress is simple: if such an exemption is not provided then many of the less affluent universities who participate in NCAA Division I competition will be forced to reduce both the quantity and quality of intercollegiate athletic programs for both men and women and, eventually, be unable to participate at all.

Many universities, San Jose State among them, exist on hand-to-mouth athletic budgets (we are not, after all, like Ohio State or Texas or Southern California) and for some time we have been between the rock of inadequate income and the hard place of increasing costs, and the effect of Title IX requirements—unless eased to exempt football and basketball—could very well lead to the elimination of programs in both men's and women's intercollegiate athletics. In my opinion that would be unfortunate for the student body, the student athletes, the University, and the public at large.

Please be reassured my argument is not a disguised polemic against women's intercollegiate athletics, for we not only value our program in women's intercollegiates but in recent years have dramatically intensified financial support for that program (e.g., funding for the men's program has remained fairly stable while that for the women's program has had more than a 100% increase with plans for even further support).

I am concerned that you appreciate this point, because I understand the same argument I am offering you is being made by some of the neanderthals in athletics who cannot distinguish between competitive athletics, patriotism, and God's will and who believe it is some kind of crime against nature for universities to sponsor and support women's athletics in a serious, equitable way. Please be reassured that, despite the similarity of the conclusions of the arguments, mine is in no way based on such anti-intellectual, sexist considerations.

My argument, rather, is based on a hard analysis of this University's fiscal condition and nothing else.

I urge you and the Congress to exempt revenue producing sports from the requirements of Title IX.

Sincerely yours,

HOBERT W. BURNS.

GREEN BAY, WIS.,
June 17, 1975.

Hon. JAMES G. O'HARA,
Chairman, House Postsecondary Education Subcommittee,
House of Representatives,
Washington, D.C.

DEAR MR. O'HARA: I strongly support the rulings of President Ford on Title IX and urge that you do likewise. The arguments that the men's programs will be weakened by the ruling is merely an admission of a weakness already present in those same programs. I disagree with that admission. The growth and development of women's athletic programs is a natural phenomena. For too long opportunities for women in sports have been denied. Will the doors be closed once again because the men fear their area is being challenged?

Athletic Directors and male coaches recite the same tale, when asked, that the men's programs will be hurt by the President's ruling. I know from personnel experience and observation that women in general do not want to participate in men's programs. While as in all situations there are some exceptions, women want their own programs. Let any college offer an equal number of grants to women as men, and you will have no "crossover" to the men's programs. Let an Ohio State spend six million dollars on its women's athletic program as it does its men's. No woman will spend a minute trying out for the men's teams. The reason for the ruling was caused by the male coaches and athletic directors unwillingness to allow women's programs to exist.

I urge you to support equality through Title IX. If you had time to listen to Darryl Royal, find the time to listen to Patsy Neal. Her side of the story is equally interesting.

Yours truly,

DOROTHY A. GUILIANI.

IOWA ASSOCIATION FOR HEALTH, PHYSICAL, EDUCATION, RECREATION,
June 25, 1975.

Rep. MICHAEL T. BLOUIN,
U.S. House of Representatives,
Washington, D.C.

DEAR REP. BLOUIN: On Friday, June 20, I attended the subcommittee hearings at which the NCAA presented its position concerning Title IX regulations as interpreted by HEW. I was very pleased with the questions you asked.

It may be of interest to you to know that in the audience were 37 President-Elects of state association for Health, Physical Education and Recreation, which group of educators are deeply concerned about the role of athletics in educational institutions. As you may have gathered from the semi-constraint reactions of some of our group, most of us do not agree and in fact strongly disagree with some of the positions taken by NCAA. Most of us in the group have been, and many still are, coaches and athletic directors in the public schools or with colleges and universities.

I thought you might be interested in the enclosed article from the University of Iowa campus newspaper, The Daily Iowan. I believe it does to some degree represent a large segment of the athletic community.

If I could be of any help in furnishing additional information concerning this issue, I will be happy to do so.

Sincerely,

DAVID K. LESLIE,
President-Elect, IAHPER.

[From the Daily Iowan, June 18, 1975]

UI ATHLETIC ADMINISTRATORS BACK OFF FROM ROYAL'S IRE

(By Bill McAuliffe, Sports Editor)

Fighting the good fight, Texas football Coach Darrel Royal exclaimed before a House subcommittee on education Tuesday that the Title IX rulings regarding athletics, if enacted, would destroy intercollegiate athletics as we know them.

Some of the powers-that-be in athletics at Iowa, however, feel that Royal may have overstated his case.

"I don't really know at this time how anyone could make a blanket statement either way," said Bob Commings, Iowa head football coach.

Robert E. Kelley, chairman of the Board in Control of Athletics at the UI, said that "the line Royal is using about the evils that will be accomplished is the line the NCAA has used.

"My own feeling," Kelley continued, "is that this 'threat' that many people feel may turn out to be a matter of individual institutions."

Kelley explained that while at some schools the non-revenue-producing sports "may be wiped out or relegated to club status," some, on the other hand, may find a middle route which will distribute athletic wealth among the minor sports while allowing the money sports to continue to thrive.

"If major sports are reduced wisely," Kelley said, "I think schools will find a way to keep minor sports competitive.

"There is a chance that (Royal is) making a shrill, last-ditch effort to get other benefits. You know, you go after the big fish to catch the little ones," Kelley said, referring to the NCAA stand that major sports should be exempted from Title IX because they are not supported by federal funds.

But the athletic board chairman did see certain problems arising from the various possible methods of enforcing the Title IX rulings and from the simultaneous need to cut athletic costs.

"In some sports," he said, "in football and basketball especially, tuition-only tenders will not enable some students to come to the university at all.

"There are a great number of alternatives, but the ability of non-revenue-producing sports to be competitive on the national level will be made much tougher," Kelley said.

As to what steps might be taken at the UI to adhere to the new anti-discrimination rules, Kelley was uncertain. He said that by Sept. 1 things should be much clearer in light of any possible NCAA action or changes Congress might make in the Title IX clauses.

"We have a temporary solution here with the 40 scholarships for women," Kelley said, referring to grants that will be available to UI women athletics this fall.

"But what will happen here—I just don't know," he said.

Kelley stressed that Big Ten member institutions are proud of their well-rounded athletic programs and will do everything possible to maintain their minor sports.

But it was Commings who tackled the issue of equality for men and women in sports with an almost lyrical optimism.

"The Equal Rights Amendment says that football is an integral part of the educational system," the coach began. "And, if indeed we are, we'll find a way to live happily ever after.

"Football has had many crises, but we've gotten past 'em," Commings added.

[Mailgram]

Representative JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

I strongly urge your congressional committee to support title 9. I have just completed 3-year term on University of Michigan Alumnae Governing Board where I chaired Special Committee on Athletics for Women. Title 9 will not be disaster to male football and basketball team. While looming on horizon title 9 has already had positive effect on athletic programs for women (intercollegiate, club, intramural, recreational) on many university campuses. Women need title 9 to promote equal opportunity in many areas not just athletics.

MILDRED KNAPP, *Detroit, Mich.*

MONROE, MICH.,
June 27, 1975.

Hon. JAMES O'HARA,
Rayburn Office Building,
Washington, D.C.

DEAR MR. O'HARA: Experts feel that the Title 9 Regulations conform with the law and I urge you to allow them to go into effect in their entirety on July 21.

MRS. LOWELL HUDSON.

JUNE 24, 1975.

DEAR REP. O'HARA: Please register my support in your House Education Subcommittee for support of the Title IX regulations without change and my opposition to amendment of Title IX to exclude revenue-producing sports.

Yours truly,

ROBERT W. HOLDEN,
San Diego, Calif.

[Telegram]

Representative JAMES O'HARA,
Washington, D.C.

Title 9 regulations clearly conform to law. Urge you allow them take effect in entirety.

HELEN CLARE HUDSON,
Ann Arbor, Mich.

WINTERVILLE, GA.,
June 25, 1975.

DEAR REP. O'HARA: I hope it is not too late for your committee to consider these opinions on Title IX. It is unfortunate that more people didn't realize the total impact of this document, and I'm afraid it will cause much unhappiness across the land if it not changed.

We appreciate all your efforts.

I am a woman in my early 40's, native of Ithaca, N.Y., and attended Cornell University. We have lived here for 17 years where my husband is on the faculty at the University of Georgia. I have been active in PTA, helped all through our public schools. We have a son, 14, who is scholarly, athletic and likes to farm.

I tried to get on the agenda to testify at your hearings as just a citizen, not a member of an organized pressure group, and N.O.W. certainly does not speak for anybody I know.

We are counting on you.

Sincerely yours,

ALDIES EDWARDS.

TESTIMONY ON TITLE IX REGULATIONS

To: Rep. James G. O'Hara, chairman, Subcommittee on Postsecondary Education, and members of the committee.

From: Mrs. Aldies Olafson Edwards, citizen of route No. 1, Winterville, Ga. 30683 Tel. 404-742-5717.

HEW has come up with many guidelines in the final Title IX regulations, which I believe go way beyond the intent of Congress. Unfortunately, in all the controversy over athletics, too little attention has been paid to other important aspects of the guidelines. I believe they will have a startling and revolutionary effect across the country—that is, if the people will put up with them, which I predict they will not. I have found that most people do not know what is in store for them, and we are still relying on you, our elected officials, to protect our interests—in this case against many radical proposals from HEW. I will outline a few of my thoughts for your consideration.

AIDING AGENCIES, ORGANIZATIONS OR PERSONS WHICH DISCRIMINATE BY SEX 86.31 (7) AND 86.51 (a) (b) (7), (8), (9) AND (10)

What is proposed here is unreasonable and interferes with the social rights of men and women. There are many women's social clubs, service organizations, honorary societies, recreational activities, etc. with long, cherished and honorable traditions, just as there are for men, and to come up with these rules will simply destroy many of them. Is that the aim of Congress? Apparently it is the aim of HEW—to destroy or else achieve a totally unisex society. I will give you a few examples of the impact this would have:

Many communities rely on the local school as a meeting place in Winterville, Clarke County School property is used as a meeting place for activities of the Silver Hair Club, Civitan, Junior Woman's Club, Civinettes and other groups which consist of one sex or the other. If they wanted to continue to meet there, they would have to change by-laws and membership. The federal government has no right to interfere with the membership of these groups.

Clubs and societies with members of one sex or the other in our colleges or schools would be destroyed.

Honorary societies, such as Mortar Board, could not continue with just women members.

Women's faculty groups, or faculty wives groups, student wives groups (Law Dames, for example) could not exist as they do.

The Continuing Education Center at the University could not allow Kiwanis, American Association of University Women, Republican Woman's Club, Democratic Women's Club or any other group with members of one sex to have conferences, meetings or banquets in their facilities, nor could they assist them in any way.

These are but a few examples of what this regulation would do. Is that what we want? I don't think so.

RULES OF APPEARANCE AND BEHAVIOR 86.31 (4) (5)

The mind boggles at what could be the result of forbidding recipients of federal funds from having any rules of appearance or behavior. Does it mean that a girl could participate topless in certain activities because boys do? Boys could be permitted to dress like Klinger in M*A*S*H? Surely, educational institutions should be able to make reasonable rules, locally, pertaining to appearance and behavior.

PHYSICAL EDUCATION

Boys and girls should not have to take physical education together, especially when they reach the age of puberty. No matter what HEW rules, girls and boys are different, each sex with unique capabilities. This rule is supposed to promote equality for women, but I believe it would only be putting them at a disadvantage, physically and psychologically. We could run into some severe social problems with this rule and in many schools and colleges, it may result in the discontinuance of physical education programs, which would be a shame. This rule is simply not realistic.

There are many other controversial problems with these Title IX regulations which I am sure have been pointed out to you by educational organizations regarding tests or standards for entrance or employment (sheer merit doesn't seem to count any more) treatment of pregnant girls and women, and benefits, to name a few.

HEW has strayed far away from the intent of Congress to provide equal opportunities for members of both sexes in education and employment. There are some real differences between males and females, so everything cannot be absolutely equal—and that is the reality of the situation. What HEW proposes is massive interference in the running of our local institutions, educational and social. They have produced regulations which I believe will be unacceptable to the majority of normal citizens. They are trying to force a social revolution most of us do not want.

I hope that you will be able to correct and modify some of these regulations so they are more reasonable and in line with the intent of Congress and the people—men and women.

Respectfully submitted,

ALDIES OLAFSON EDWARDS.

Leadership Conference on Civil Rights,
Washington, D.C., June 30, 1975.

Hon. James O'Hara,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, U.S. House of Representatives, Cannon Building, Washington, D.C.

Dear Jim: We are well aware of the intention of some Members of Congress—we hope a small minority—to attempt to block the implementation of the Title IX regulations approved by the President. In our judgment, such an action would be most unfortunate, totally unwarranted and contrary to the national interest.

As you know, the Leadership Conference on Civil Rights is deeply concerned about discrimination wherever it exists in our society. We believe discrimination based upon sex should be eliminated in federally-assisted activities. Title IX and the implementing regulations scheduled to take effect on July 21, 1975, constitute important measures in our continuing national effort to achieve equal opporunity in education programs. The Congress, in our view, should not take any action to delay the effective date of the regulations.

The regulations are not perfect; they could be more comprehensive and stronger in protecting women against discrimination. But we believe they are major steps in the right direction.

On behalf of the 135 civil rights, labor, religious, women's and public interest organizations participating in the Leadership Conference, we urge you to oppose any effort to delay the implementation of the Title IX regulations. Your consideration of our position on this important issue will be greatly appreciated. Please include this communication in the hearing record of your Subcommittee on this matter.

Sincerely,

Clarence M. Mitchell,
Legislative Chairman.
Joseph L. Rauh, Jr.,
Counsel.

Sigma Nu Fraternity,
Lexington, Va., September 27, 1974.

Congressman James G. O'Hara,
Longfellow HOB,
Washington, D.C.

Dear Congressman O'Hara: I am writing on behalf of the Sigma Nu Chapters that I advise in the state of Indiana. The chapters at Ball State, Butler and Purdue Universities are concerned about the interpretations and implementation of Title IX of the Education Amendments of 1972, which were published on June 20, 1974.

We feel that the regulations in Part 86 attempts to regulate the membership practices which have existed for nearly two hundred years in the social fraternity system in this nation. The proposed regulations which would allow integrated membership with separate housing would have no effect in practice, except to destroy the individuality of the fraternity and sorority systems. For all intent and purposes the fraternity and sorority systems provide equal opportunity for membership and housing in each sex category. We maintain that the regulations should provide for separate memberships and separate housing by sex within the Greek System.

We believe the proposed regulations would be an unlawful intrusion upon the legislative powers of the United States Congress and upon the constitutionality guaranteed to the citizens of this nation. We ask your intervention on behalf of your constituents who are members of college fraternities and sororities.

Sincerely yours,

G. Lynn Morris.

Gardner-Webb College,
Boiling Springs, N.C., September 16, 1974.

Congressman James G. O'Hara,
12th Michigan District, Rayburn House Office Building,
Washington, D.C.

Dear Congressman O'Hara: I wish to express my concern regarding the proposed Rules published by HEW to effectuate the statute of Title IX of the Education Amendments of 1972. I feel that rules reveal governmental intrusion into the internal affairs of colleges and universities. In effect, HEW exceeds the legislative intent of the statute by the proposed Rules they drafted for Title IX.

Several of our local Congressmen were contacted, but they were not aware of the Rules outlined by Mr. Weinberger, which if enforced, would completely destroy the philosophy, autonomy, and uniqueness of private higher education of which Gardner-Webb College is a part of.

I strongly disapprove of the Rules as outlined by Mr. Weinberger. I appreciate your attention in this matter.

RUTH KISER,
Director of Women's Services.

FARMHOUSE FRATERNITY,
St. Joseph, Mo., September 25, 1974.

Hon. JAMES G. O'HARA,
House Special Sub-Committee on Education,
Longworth HOB, Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am writing on behalf of FarmHouse Fraternity concerning the implications of the proposed regulations for Title IX of the Education Amendments of 1972.

First, I wish to complain that the information and interpretations that the Department of Health, Education, and Welfare are giving to fraternity members, friends of the fraternity system, and to the colleges and universities is vague, ambiguous and confusing at best. Further, there appear to be indications that H.E.W. is planning to interpret and enforce these regulations in a manner that violates the intent of the legislation passed by Congress.

FarmHouse Fraternity has always taken great pride in its relationship with the universities with which we are associated across the nation. We have always insisted that our chapters be recognized and sanctioned by their university because we believe in our members being productive and fully participative citizens of the university and local communities.

Should the direction that H.E.W. appears to be taking jeopardize this relationship between the chapters and the universities, this would be most unfortunate and undesirable in our opinion. Further, there are indications that the interpretation of H.E.W. interferes and infringes upon this and other fraternal organizations' right of free assembly, freedom of association, privacy, liberty, property and thought.

We ask for your attention to this subject and for any necessary action on your part to clarify the intent of Congress and to prevent any action by H.E.W. which may be detrimental to college social fraternities and sororities and their many members.

Sincerely,

ROBERT L. OFF,
Executive Director.

THE CHI PHI FRATERNITY,
Atlanta, Georgia, October 2, 1974.

Congressman JAMES G. O'HARA,
House Special Sub-Committee on Education,
Longworth HOB, Washington, D.C.

DEAR CONGRESSMAN O'HARA: We are informed that the Department of Health, Education and Welfare has proposed rules which would, depending on their interpretation by the Director, result in fraternities and sororities being forced to accept members of the other sex (Federal Register release June 26, 1974, dealing with Non-discrimination on the basis of sex, Title IX).

It is our contention that the provisions of Section 804(b) of the Higher Education Act of 1965 continue to be in full force and effect and that Title IX and the proposed regulations cited have no bearing on or meaning with respect to college general social fraternities. Section 804(b) reads as follows: "Nothing contained in this act or any other act shall be construed to authorize any department, agency, officer, or employees of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institution." Section 804(b) was further clarified by the colloquy on the Floor of the House on October 20, 1965, between Mr. Powell and Mr. Waggonner in which it was established that the intent of Congress was that fraternities continue to be exempt, even if one occupies a university owned building or owns a building on leased university land providing a fair rental or service charge is paid. It is our contention that an agreement considered as fair at the time of execution should be considered as fair until the expiration of the agreement, regardless of the term.

With respect to support, it is fact that none of our chapters receive financial assistance from an institution that is a recipient of Federal Funds. All support received is contended to be in the form of advisement on a one-to-one/counselor-to-student basis; in the form of occasional use of facilities open to all students such as the use of intramural fields or grounds, otherwise unoccupied classrooms, or infrequent clerical services. This support is not seen as substantial or in violation of the thrust of the proposed regulations.

We seek your support and request that you join us in requesting that the proposed regulations, the hearings for which conclude October 15, 1974, be changed to specifically exclude college general social fraternities and sororities in order to reflect existing law as well as clarify the existing proposed regulation which can well be so easily misinterpreted.

Thank you for your help.

Sincerely,

CARL J. GLADFELTER,
National Director.

SOUTHERN COLLEGE PERSONNEL ASSOCIATION,
September 12, 1974.

Congressman JAMES G. O'HARA,
Chairman, Special Hearing Committee on Title IX
Rayburn House
Washington, D.C.

DEAR CONGRESSMAN O'HARA: It is my opinion that HEW, in drafting the proposed Rules for Title IX, has gone far beyond the legislative intent of the statute.

In checking with several of our local district North Carolina Congressmen, they were aware of the bill of non-discrimination on the basis of sex, but were not aware of the rules implied in Mr. Weinberger's news release of Tuesday, June 18, 1974, outlining the proposed Rules. My question to you, sir, is—how many other Congressmen are not aware of the fact that the Rules as outlined by Mr. Weinberger, if enforced, would completely destroy the philosophical concept, autonomy, and uniqueness of private higher education in this great country of ours.

I am enclosing a prepared statement by Dr. Donald Gehring which will appear in the October issue of Southern College Personnel Association Newsletter. Please take time to read this because I feel it represents the frustrated views of many of my colleagues in higher education.

I am *bitterly opposed* to the *Rules* as outlined by Mr. Weinberger.

Thank you for your attention in this matter of great concern in private education.

Sincerely,

BILL J. BRIGGS,
President.

A STATEMENT ON TITLE IX FOR THE SOUTHERN COLLEGE PERSONNEL ASSOCIATION OCTOBER NEWSLETTER

The intent and spirit of Title IX of the Education Amendments of 1972 are commendable. The time to eradicate sex discrimination from our educational institutions has long since passed and higher education particularly needs to purge itself of the remnants of this bascially unfair action. Title IX has certainly aroused that awareness.

However, the passage of Title IX, and especially the proposed Rules published by H.E.W. to effectuate the statute is simply substituting one evil for another. Discrimination on the basis of sex is admittedly wrong, but an even greater evil is the government intrusion into the internal affairs of colleges and universities which is inherent in the proposed Rules. For example, the proposed Rules unequivocally state that colleges and universities shall determine annually the sports in which each sex desires to participate (86.38 (b)). Not only does H.E.W. tell institutions what must be done but they also stipulate that the method used to determine this desire must be approved by the Director of the Office of the Civil Rights of H.E.W. (86.38(b)). Programs must then be offered on the basis of this annual determination (86.38 (b)). In other words, H.E.W. is for all intents and purposes, directing the athletic programs of individual institutions.

The above example, and others which could be cited, seems to indicate that H.E.W. in drafting the proposed Rules has gone far beyond the legislative intent of the statute. Title IX specifically states in Section 905 that, "nothing in this title shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guarantee." Title IX is a part of Education Amendments Act of 1972 and that Act amends the Higher Education Act of 1965 which states, "nothing contained in this chapter shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision or control over the curriculum, programs of instruction, administration or personnel of any educational institution, or over the selection of library resources by any education institution." Title 20, Chapter 28, Subchapter 7, Section 1144, United States Code.) There is an obvious inconsistency between these sections and what H.E.W. has proposed.

H.E.W. has not shed much light on this inconsistency. When asked at the Atlanta briefing, if the proposed Rules were not in conflict with section 1144 of the Higher Education Act of 1965, Ms. Gregory responded that H.E.W. not directing, supervising or controlling the programs, administration or was personnel of any institution. What H.E.W. was doing, she explained, was saying that if institutions did not operate their programs in accordance with the rules, they were in violation and thus subject to lose their Federal aid. This results in indirect forced compliance which is, in effect, direction, supervision and control over the internal administrations of higher education—a concept which the Congress of the United States expressly prohibited.

Further evidence of H.E.W. exceeding the legislative intent of the statute is found in Section 902 of Title IX. This section directs agencies and departments of the Federal government to effectuate the general provisions (Sec. 901), of Title IX by issuing rules, regulations or orders of general applicability. However, Section 902 is emphatic when it states that "No such rule, regulation or order shall become effective unless and until approved by the President." The H.E.W. proposed Rules have not yet been approved by the President. However, Mr. William Thomas of the Office of Civil Rights has stated that he has received directives from H.E.W. officials in Washington to notify institutions which have a curfew for women that the institutions are in violation of Title IX. This is not only a governmental intrusion into the administration of higher education but a direct violation of the law by the Congress of the United States.

In addition to the numerous problems the proposed Rules raise in terms of institutional autonomy and governmental supervision over the curriculum, programs of instruction and administration of colleges and universities, there are a wealth of practical problems associated with the proposed Rules. Nowhere in the Rules does H.E.W. define what is meant by an educational program or activity. Section 901 of Title IX states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . ." Even though the words "program or activity" are used in the statue, H.E.W. has preferred not to define those terms but rather has defined "recipient" as essentially any institution which receives Federal assistance to operate an educational program or activity. What is an educational program or activity? The Department of H.E.W. in its Fact Sheet (June 18, 1974) states that, ". . . the proposed regulation applies to all aspects of all education programs or activities of a school district, institutions of higher education, or other entity which receives Federal funds for any of those programs." The implication of this statement is that there are many educational programs and activities not all of which receive Federal financial assistance. Since the statute specifically prohibits discrimination only in those educational programs or activities receiving Federal financial assistance, and since H.E.W. does not define these terms but implies that some exist which do not receive Federal funds, how can the Department propose rules to apply to programs or activities which do not receive such funds? There is nothing which permits H.E.W. to dictate that a tennis team must be open to female students simply because the college library was financed by Federal funds.

Another pragmatic problem raised by the proposed Rules concerns the term "discrimination." While H.E.W. does not differentiate between discrimination and different treatment based upon valid classifications, the courts have made such a distinction. The Sixth Circuit Court of Appeals has stated that, "The states retain, under the Fourteenth Amendment, the power to treat different persons in different ways." (475 F 2d. 707). The Court noted that there were two standards of review in cases dealing with state classifications of citizens. The first and traditional standard is that a state classification be upheld if a rational relationship exists between the different classifications imposed and the state's reasonable goals. The second standard which has recently been applied to "suspect" classifications such as race requires that the state show a "compelling interest". The Sixth Circuit Court of Appeals in this decision. (*Robinson* v. *Eastern Kentucky*) specifically dealing with a curfew for women students, decided, on the basis of a Supreme Court ruling, that sex was not a "suspect" classification. The Court also found that the classification of women students for curfew purposes was a reasonable regulation to promote the legitimate aims of the State.

Well aware of the Court's decision in this case, H.E.W. officials contend that it has no bearing on the proposed Rules since the case was decided prior to the promulgation of the Rules. Does Title IX supersede the Fourteenth Amendment to the United States Constitution and the power of the states, under this Amendment, to treat different persons in different ways? Is there any connection between the fact that it took H.E.W. two years to promulgate the proposed Rules and their rationale for the inapplicability of the *Robinson* case to Title IX?

Also, if no distinction is to be made between discrimination and different treatment based upon valid classifications, then another serious practical question arises. The proposed Rules make it clear that institutions may not, " . . . assist any organization, agency or person which discriminates on the basis of sex." Ms. Gregory pointed out at the Atlanta briefing that this was interpreted to mean that institutions could not assist external organizations inerested in recruiting students if that organization were known to discriminate on the basis of sex. If this is so, how can institutions permit any agency or department of the Federal government to recruit students or in any other way assist such departments or agencies since the Federal government is an organization which discriminates in its admissions policy for the service academics which it operates? An H.E.W. official at the Atlanta briefing responded to this question by stating that the service academics were exempt from Title IX. Since H.E.W. does not recognize different treatment based upon valid classifications, the mere fact that the academics are statutorily exempt from the law does not diminish the fact that they discriminate.

Finally, the proposed Rules contain an abundance of terms which are ambiguous. Even professionals in the field of higher education differ over their meaning. This can only lead to arbitrary and capricious decisions by those charged with, implementing the Rules. Use of terms such as "proportionate" and "comparable" are examples. Comparable quality of housing facilities (86.32 (b) (i.e.)) is dependent upon the values of the individual making the comparison. Is an air-conditioned facility on the edge of campus "comparable in quality" to a non-air conditioned facility conveniently located in the center of campus? Is a residence facility with private rooms and gang showers "comparable in quality" to a residence hall with suites and private baths, etc., etc., etc.?

Higher education in America has always been a major contributor to the strength of our nation. A large measure of the contribution of our colleges and universities stems from their freedom from governmental control and their diversity. The proposed Rules set forth by H.E.W. will homogenize higher education in this country and in so doing will eliminate one of our nation's greatest assets—diversity and the right of the people to choose. It may well be said that institutions can retain their diversity and their autonomy by electing to forego Federal funds. They can deny themselves those funds, not so long ago accepted with the promise of no governmental control, but those who choose this course will surely close their doors before too long. Those who do not choose this course will prosper with their Federal grants and look like every other instituion directed by the Federal government. Conformity is a gradual process of chipping away at those rights which allow for individual differences. When the chipping process is completed, as surely it will be if there is any precedent value to the proposed Rules, no two institutions in this country will differ in any educational programs or activities. Who, then, will have gained? In the long run, everyone will suffer—men and women—as a result of such homogenization.

The concept of eliminating discrimination whether on the basis of race, sex, national origin or any other basis is commendable and should be implemented by every institution. But higher education must be free to work out its own course to accomplish this desirable objective. Colleges and universities historically have responded effectively to the needs of society. On the other hand, the loss of institutional autonomy which would result from approval of the proposed Rules is a price too dear to pay in order to gain an immediate solution. The challenge of eliminating discrimination on the basis of sex is a problem which colleges and universities can and will solve without the undue governmental interference proposed in the current H.E.W. Rules.

Delta Delta Delta,
Arlington, Tex., October 4, 1974.

Mr. Peter E. Holmes,
Director of the Office of Civil Rights,
Department of Health, Education, and Welfare,
Washington, D.C.

Dear Mr. Holmes: The women of Delta Delta Delta, an International Fraternity, respectfully submit the following comments and suggestions regarding Part 86 of the Departmental Regulation as proposed by the Office of Civil Rights of the Department of Health, Education, and Welfare ("HEW"). 45 CFR Part 86 (1974).

Delta Delta Delta is a private social association comprised of women who are attending colleges and universities within the United States along with women who, having joined the Fraternity as university students, continue their lifetime association as alumnae members. Based on the precept that a close social relationship among undergraduate women promotes a stronger moral and academic awareness, Delta Delta Delta was founded in 1888 and now counts among its members (undergraduate and alumnae) over 102,000 women from 118 colleges and universities.

As a socially aware organization, Delta Delta Delta applauds the efforts on the part of the Federal Government to eliminate the overt barriers to equality for women. It is fully recognized that sex discrimination has continually presented a serious problem to the women of the United States. Members of Delta Delta Delta have long supported the efforts of other women's organizations in diligently pursuing equality and better opportunities for all women.

Yet, it is the belief of this organization that the proposed regulations of the HEW which are supposed to implement Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.* (1973)] are subject to interpretations that would be contrary to Congressional purpose and in conflict with the very objective of those regulations. Certain sections in Subpart D give special concern to the women of Delta Delta Delta. 45 CFR 8631–86.40 (1974). In an effort to provide constructive criticism, the following will examine these provisions in the light of Congressional intent and suggest their probable effect on private organizations if left unchanged. Moreover, a supplemental regulation will be offered which it is believed would prevent inadvertent restrictions on social fraternal organizations.

In particular, Delta Delta Delta objects to the potential interpretations of the following sections contained in the proposed regulations:

(*1*) *Section 86.31 Education programs and activities*

* * * * * * *

> (b) *Specific prohibitions.*—Except as provided in this subpart, in providing any aid, benefit, or service to a student a recipient shall not, on the basis of sex:
>
> * * * * * * *
>
> (6) Apply any rule concerning the domicile or residence of a student or applicant;
>
> (7) Aid or perpetuate discrimination against any person by assisting any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(*2*) *Section 86.32 Housing*

* * * * * * *

(c) ***Other housing.***—(1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient. (2) A recipient which, through solicitation [*sic*], listing, approval of housing, otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such action as may be necessary to ensure that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.
45 CFR 86.31; 86.32 (1974)

Delta Delta Delta fears that the preceding quoted regulations may be interpreted to promote interference by a university or college with a fraternal organization. This apprehension is bolstered by the interpretation put forth on page 8 of the HEW "Fact Sheet" which states:

> *Campus Organizations.*—Generally, a recipient may not, in connection with its education program or activity, *support or assist* any organization, agency or person which discriminates on the basis of sex. The proposed regulation does not specify in more detail what organizations, agencies or persons could not, if they operated discriminatorily, be supported by a recipient consistent with its obilgation under Title IX. It does, however, set out the major criteria to be applied in determining existence of a violation in this area, which are (1) the *substantiality* of the relationship between the recipient and the organization (including financial support and housing), and (2) the *closeness* of the relationship between the organization's functions and the educational program or activity of the recipient.

Statement by Caspar W. Weinberger, Secretary of Health, Education, and Welfare.

It is apparent from the above language that, upon adoption of the proposed regulations, campus organizations can expect considerable pressure to be applied by colleges and universities to have their membership open to both sexes. Because of the very nature of social fraternities, they could not work in this type of framework prescribed by educational institutions. Social associations have been created for the major purpose of fellowship. Although they have contributed to the educational experience of many students, sororities and fraternities have been organized as one-sex organizations primarily for valid non-academic reasons. From its inception, Delta Delta Delta has believed that its purposes of establishing "a perpetual bond of friendship among its members" and "a stronger and more womanly character" are better accomplished by restricting membership to women. Delta Delta Delta Const. Art. II (1888). Because of our belief that women living together better realize the objectives of the fraternity, this membership policy is particularly essential to Delta Delta Delta.

Strict adherence to the above proposed regulations could make it impossible for Delta Delta Delta, along with other campus social organizations, to retain its one-sex character. While they have remained totally private associations, social fraternities have cooperated with and have received benefits from many educational institutions. For example, meeting rooms, advisers, and other aids have been provided to fraternities through the institutions. This relationship would be seriously jeopardized by the implementation of the proposed regulations. As long as social organizations adhere to their justified membership policy, this assistance would appear proscribed by the proposed rules for Title IX.

Congress, in its wisdom, has also recognized the necessity of non-interference with the membership policies of fraternal organizations. In 1965, Congress passed the Higher Education Act and included within the Act the following provision:

> Nothing contained in this chapter *or any other Act* shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institution. (Emphasis added.)

20 U.S.C. 1144(6) (1970).

As important as the explicit language in the section is the legislative history behind its passage. This history began even before the above section was under consideration. Congress first gave thought to the importance of unrestricted membership practices of fraternal organizations when it considered legislation which was later to become the Civil Rights Act of 1964. 42 U.S.C. 2000e *et seq.* (1964).

Upon learning of an investigation of fraternity membership policy by an Advisory Committee of the Civil Rights Commission, Congressman Edward E. Willis moved to amend the Civil Rights Act to deny the Commission the power to investigate the membership practices of any fraternal organization. 110 Cong. Rec. 2291 (1964). Congressman Meader of Michigan added additional language to Congressman Willis' proposal which made the resulting provision read as follows:

> Nothing in this or any other Act shall be construed as authorizing the Commission, its Advisory Committee, or any person under its supervision or control to inquire into or investigate any membership practices or internal operations of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization.

Public Law 88–352, Title V, Sec. 104(a)(6), 78 St. 251 (1964). During the debate concerning this section, Congressman Emanuel Celler, in response to the argument that fraternities and sororities, as an integral part of universities which receive federal financial assistance, should be subject to investigation, replied, "In the first place, sororities and fraternities are not supported by the Government. They receive no loans or funds directly from the Government." 110 Cong. Rec. 1196 (1964). The above section became law.

Yet, as soon as 1965, Congress was called upon to reaffirm its position that the membership practices of fraternal organizations should be unrestricted. At that time, it was learned that the United States Commissioner of Education, relying on regulations of the HEW authorized under Section 602 of Title VI, was taking steps to require colleges and universities to investigate the membership policies of sororities and fraternities located on their campuses. In response to this action, the section of the Higher Education Act quoted previously was adopted by Congress.

The debates which preceded the adoption of this legislation provide additional evidence of the necessity of an unrestricted membership policy. Congressman Joe Waggonner of Louisiana originally introduced a proposal to exempt fraternal organizations from direct or indirect interference by the Federal Government. While introducing his amendment, Congressman Waggonner said, "It would seem imperative that there be legislation making it clear that the Congressional intent evidenced by the prohibition in Title V applies to the whole Act and particularly Title VI and, further, that such prohibition will apply to this bill *and any other act of Congress.*" 111 Cong. Rec. 21947 (1965). (Emphasis added). To this, Congressman Adam Clayton Powell added that he did not believe "there should be any withholding of funds from any institution of higher education because of discriminatory practices on the campus by private clubs." 111 Cong. Rec. 21947 (1965). The House passed the amendment and sent it to the Senate.

In the Senate, more debates took place concerning the relationship of the Federal Government and social fraternal organizations. Senator Dirksen of Illinois, who supported the amendment, emphasized that "the protection most fundamental of all freedoms is the freedom of association, and that is involved here." 111 Cong. Rec. 11675 (1965). Congress clearly expressed the legislative policy that the membership practices and internal operations of a private fraternal organization be left free of governmental interference.

Delta Delta Delta strongly believes that the Congressional intention, as evidenced by 20 U.S.C. 1144(b) (1970), is to leave fraternal membership practices unrestricted. This intent should be exhibited in the presently proposed regulations. Reason would dictate that like Title VI of the Civil Rights Act of 1964 and Title VII of the Higher Education Act, Title IX of the Education Amendments of 1972 was intended to afford equal opportunity, aid, benefit, and services to all students. This aim is not fostered by the integration of the sexes within the membership of a social fraternity.

The present regulations recognize certain areas wherein there exists a valid distinction based on sex. *See e.g.*, 45 CFR 86.33 (1974); 45 CFR 86.32(b) (1) (1974); 45 CFR 86.38(a) (1974). Delta Delta Delta and other fraternal associations are examples of groups where one-sex membership is instrumental in accomplishing the groups' goals. For example, the goal of Delta Delta Delta to establish a perpetual bond of friendship among its members is best accomplished by encouraging its undergraduate members to join together in living groups. Of course, it would be morally unacceptable to the women of Delta Delta Delta to encourage a sexually integrated living group. The authors of the proposed regulations have themselves recognized, as did Congress, that separate housing is a valid distinction on the basis of sex. 45 CFR 86.32(b) (1) (1974). If the social fraternity cannot provide its members the benefit of the bonds of friendship which accompany a group living arrangement, one of its oldest and most basic goals will be sacrificed.

The only procedure which would insure the continuation of the social fraternal associations and would not be inconsistent with the true objectives of Title IX of the Education Amendments of 1972 is a supplemental provision to be included in the regulations. In particular, the women of Delta Delta Delta respectively submit the following amendment be incorporated within the proposed regulations:

> Nothing contained in these regulations shall be construed to have any effect on the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at any institution of higher education (other than a service academy or the Coast Guard Academy) which does not receive funds from the Federal Government.

Although Delta Delta Delta applauds the efforts of the HEW to equalize the opportunities of all students, we feel it necessary to express a deep concern with the present regulation. This organization firmly believes that the specific regulations prepared by HEW be amended to represent adequately the realistic objectives of women's fraternal organizations.

In order that the legitimate purposes of fraternal associations may be accomplished, it will be necessary that those associations adhere to a traditionally one-sex membership policy. In their separate manner, academic institutions and fraternal associations have each worked to bring about an educational excellence for nearly two centuries. To alter the successful practices of the fraternal organizations would not only have a detrimental effect on the institution, but would be harmful to the students they are intended to serve.

Sincerely,

Mrs. Robert M. Baker,
President,
For the Executive Board.

Lees-McRae College,
Banner Elk, N.C., September 23, 1974.

Congressman James G. O'Hara,
Rayburn House Office Building,
Washington, D.C.

Dear Mr. O'Hara: The proposed rules to implement Title IX of the Education Amendments of 1972 raised a number of problems for our institution. In behalf of our students, faculty, and staff I request that you seriously consider the implication of those proposed rules and make the necessary adjustments.

Meeting in Banner Elk, North Carolina on Monday, September 16th, the Board of Trustees of Lees-McRae College instructed me to send to you the enclosed paper which raises specific questions about the proposed rules.

We appreciate your interest in private higher education and solicit your continued support.

Thank you for your consideration.

Sincerely yours,

E. O'dell Smith,
Dean of Students.

Sigma Nu Fraternity,
Lexington, Va., September 20, 1974.

Dear Sir: I enclose a copy of a protest filed by Sigma Nu Fraternity to the proposed regulations published on June 20, 1974 for the interpretation and implementation of Title IX of the Education Amendments of 1972.

On behalf of Sigma Nu Fraternity, I wish to take this opportunity to lodge a similar protest with the House Special Sub-Committee on Education. It is our contention that the published regulations go beyond the intent of the legislation for which they are published.

We would appreciate your consideration of these objections and whatever assistance you can give in effecting a rewriting of the published regulations.

Sincerely,

WILLIAM K. AMIOTT, *Executive Secretary.*

Enclosure.

PROTEST OF SIGMA NU FRATERNITY TO PROPOSED HEW REGULATIONS FOR TITLE IX, EDUCATION AMENDMENTS OF 1972

Sigma Nu Fraternity objects strongly to the proposed regulations published by the Department of Health, Education, and Welfare in the *Federal Register* on June 20, 1974 for the interpretation and enforcement of Title IX of the Education Amendments of 1972. The objection rests principally on the interpretation of Section 901 which states that:

(*a*) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Specifically, Sigma Nu Fraternity maintains that:

1. The proposed regulations of the Department of Health, Education, and Welfare go far beyond the intent of Congress in the legislation enacted in 1972. The office of Senator Birch Bayh and that of Representative Edith Green have provided detailed information concerning the intent of these sponsors in the Senate and the House of the original legislation. It is clear that Title IX was designed to eliminate discrimination on the basis of sex in the area of admissions, employment, and equal opportunity in programs, in academic institutions supported in whole or in part with Federal funds.

2. The constitutional rights of the members of Sigma Nu Fraternity are violated as are the inherent rights of this organization. The backbone of the fratenity system in the right of an individual freely to associate with those of his own choice. We believe this to be a basic precept in our form of government, guaranteed by the Constitution of the United States in the First and Fourteenth Amendments. We also contend that the interpretation placed by Mr. Weinberger on behalf of he Department of Health, Education, and Welfare interferes with and infringes upon this organization's right of free assembly, freedom of association, privacy, liberty, property, and freedom of thought.

3. That the Department of Health, Education, and Welfare in the publication of the regulation is attempting to do indirectly what the courts have denied it the right to do directly. Control of the membership policies of college social and fraternal organizations is removed from the jurisdiction of the Federal Government by the Higher Education Act of 1965 which states:

(b) Nothing contained in this act or any other act shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are owned by such institution.

This provision of the Higher Education Act of 1965 reinforced that part of Title V of the Civil Rights Act of 1964 which stated: (6) Nothing in this or any other act shall be construed as authorizing the Commission, its Advisory Committees, or any person under its supervision or control to inquire into or investigate any membership practices or internal operation of any fraternal organization, any college or university fraternity or sorority, any private club or any religious organization.

4. That the Education Amendments of 1972 were not intended by Congress to repeal or modify the aforesaid exemptions relating to fraternities and sororities in the 1964 and 1965 legislation. This is affirmed both on the basis of the intent of the legislation and the lack of any clear statement suggesting repeal.

5. The threat of integrated membership made under the published regulations is unlawful. For almost two hundred years the sorority and fraternity systems have provided separate but equal opportunity for membership. The proposed

regulations which would allow integrated membership with separate housing would have no effect in practice except to destroy the individuality of the fraternity and sorority systems. For all intent and purposes the fraternity and sorority systems provide equal opportunity for membership and housing in each sex category. We maintain that the regulations should provide for separate membership and separate housing by sex within the Greek system.

In summary, we believe that the proposals proposed on June 20 are unlawful and unworkable. We believe they will cause considerable harm. We also believe that they are a clear and undeniable attempt on the part of the Department of Health, Education, and Welfare to broaden beyond reason the intent of the legislation and therefore constitute an infringement of the right of Congress to enact the laws which govern this nation. These regulations should be revised in conformity with these and related objections.

SIGMA CHI FRATERNITY,
Evanston, Ill., September 25, 1974.

Hon. JAMES G. O'HARA,
House Special Subcommittee on Education,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am sending copies of recent correspondence from the Sigma Chi Fraternity sent to the Office of Civil Rights of the Department of Health, Education and Welfare, and to a number of congressmen, expressing our concerns about proposed regulations by HEW on the matter of government control of sex discrimination.

We hope this information will be helpful to you and your committee in attempting to insure that congressional intent is carried out in the matter of the Department of HEW attempting to implement the provisions of Title IX of the Federal Education Amendments Act of 1972.

Sincerely,

WILLIAM T. BRINGHAM,
Executive Secretary.

Enclosure.

SIGMA CHI FRATERNITY,
Evanston, Ill., September 18, 1974.

Mr. PETER HOLMES,
Office of Civil Rights, Department of Health, Education, and Welfare, Washington, D.C.

DEAR MR. HOLMES: I am writing on behalf of the Sigma Chi Fraternity to comment on the presently proposed implementing regulations published earlier this summer by the Department of Health, Education, and Welfare related to Title IX of the Federal Education Amendments Act of 1972.

We are quite concerned about certain implications and possible future results of the proposed regulations, if adopted as presently constituted. Given the possibility of a variety of interpretations, possibly contradictory, by various department officials and university officials in response to these regulations, we are concerned that there could be resultant consequences which would go beyond or conflict with Congressional intent in adopting this and related acts, or possibly even go beyond the intent of HEW.

Fraternities such as Sigma Chi, which are privately funded social organizations which receive no Federal Government funds, find themselves in several dilemmas, as do fraternal organizations for women, generally called sororities. Already, fraternal organizations have received inquiries from several universities, if not specific directions, even though the proposed regulations are still open for comment and have not yet taken effect nor been set forth in final form.

I will point out that chapters of fraternal organizations are chartered by the respective national or international fraternal organization, and not by the universities themselves as such. It is true that in some instances, chapters of fraternal organizations do occupy housing which, to one degree or another is owned by the university or college which likely is a recipient of Federal funds. In no case are these facilities occupied rent free and in some instances, fraternal organizations or their members are required by the institution to occupy such facilities, constituting a double dilemma for organizations such as ours when it comes to pressures from Government regulations. There are certainly no instances where fraternal organizations are primarily supported financially by the college or university where they are located, whether or not they occupy university owned housing.

The matter of housing, of members of the fraternal organization living together, is one of prime importance in the successful functioning of a fraternity organization. Having the members live together enhances communication and group functioning. In many instances, fraternity chapters have to have all of their members living in their housing facility in order to make ends meet financially. This, then, brings up another dilemma for fraternal organizations in the present regulations which seems potentially perhaps contradictory in light of the fact that the regulations specifically state that colleges or universities which are the recipient of Federal funds are not required to have members of different sexes occupying the same housing facility.

It also seems potentially ironic that fraternal organizations, almost all of which have been of one sex in their membership traditionally and since their origin many years ago, could be placed in the situation of changing this when the regulations and the Federal Education Amendments Act itself grants an exemption, in admissions, to public institutions which have traditionally and continually been single sex. Further, it is noted that the proposed regulations permit colleges and universities to continue to have athletic teams of separate sexes whereas it is possible that fraternal organizations, indirectly if not directly, could be left out of such exemption.

It should be pointed out also that on virtually every campus where Sigma Chi and most other fraternal organizations for men have chapters, there is also a sorority system for women which is generally comparable and which, in many cases, has housing facilities which exceed in quality and cost those of the mens fraternities, even though these housing facilities were financed usually privately. An exception to the existence of a sorority system would be, of course, several schools where only men students are admitted. However, it is generally the case, that there are equal opportunities for men and women to enjoy the fraternity sorority experience in organizations of their own sex on their own campus, and the campus chapters of these organizations are free to choose members without regard to race, religion or national origin.

There is the further concern that, to some extent, the proposed regulations and, to a perhaps larger extent, resultant interpretations and actions, which are a part of the current non-discrimination on the basis of sex regulations, could conflict with provisions of amendments (Section 804(B) adopted by Congress as part of the Civil Rights Act of 1964 and Higher Education Act of 1965. Such amendments, as you no doubt know, specified that nothing in those acts or any other act authorized department or officer of the United States Government to exercise any direction or control over the membership practices or internal operations of fraternal organizations . . . whose facilities are not owned by such institution.

In addition, Congressional debate on this subject at the time this subject was under consideration in connection with the above acts apparently established the point that the amended language noted above exempted privately owned facilities on long term leased land from any Federal supervision.

On the one hand accompanying comment from the Department of HEW on the proposed rules points out (on page 2229) that Section 86.31(B) "might apply to official institutional sanction of a professional or social organization," going on to cite a criteria of substantiality of relationship between the recipient and other party involved in terms of financial support and educational program.

On the other hand, Secretary Weinberger has been quoted as saying, in a press conference after the regulations were published, that the purpose or intent of these proposed regulations was not to do away with sororities and fraternities as they are presently constituted.

Because of the points raised above and because of the basically private, self-supporting nature of fraternal organizations such as Sigma Chi, we feel that such organizations should not be governed by regulations such as those currently proposed and open for comment, and that the Federal Government should not interfere in the selection of members for such organizations. As has been pointed out above, such may not be the intent of such regulations but can well be an indirect result if care is not taken to restrain interpretation or results which go beyond the direction of spending of public funds.

We believe that the autonomy of private fraternal organizations can and should be maintained in such instances and can be done without watering down the basic thrust of this legislation to insure non-discrimination in those areas of proper public, as distinguished from private, concern.

We appreciate your attention to these somewhat numerous observations and concerns, and hope that this information will be helpful and productive in finalizing considerations on this subject.

Sincerely yours,

William T. Bringham,
Executive Secretary.

Sigma Chi Fraternity,
Evanston, Ill., September 12, 1974.

I am writing to you on behalf of the Sigma Chi Fraternity to express our great concern about certain implications and possible future results of recent Federal goverament actions in the area of sex discrimination. This concerns, specifically, Title IX of the Federal Education Amendments Act of 1972, and the proposed implementing regulations published earlier this summer by the Department of Health, Education, and Welfare.

As you no doubt know, the period of comment on these regulations is still open and will continue until October 15, 1974.

We solicit and would welcome your support and assistance in communicating with the Department of Health, Education, and Welfare on this matter, in that fraternities such as Sigma Chi are self supporting and not supported by Federal funds, and are basically considered to be private, "social fraternal organizations." This does not automatically remove fraternities from involvement in such issues, however, and it would seem that there are some implications for fraternities should the existing regulations become law as drafted. As reflected below, this was not necessarily the intent of H.E.W., but could well be the result.

As background, Section 901(A) of Title IX of the Federal Education Amendments Act of 1972, as adopted by the Congress, states that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . . ."

In the proposed regulations, which are still open for comment, Section 86.31 provides that "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, will be subjected to discrimination under any academic, extra-curricular, research . . . or other education program or activity operated by a recipient (i.e. a university or college) which receives or benefits from Federal financial assistance."

Sub-section (B) of that includes provisions that a recipient (school) "shall not . . . aid or perpetuate discrimination against any person by assisting any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or otherwise limit any person in the enjoyment of any right, privilege, advantage or opportunity."

These sections are pretty broad and leave quite a bit of room for interpretation. H.E.W. Secretary Casper Weinberger, in accompanying comments to the published regulations, noted that "a recipient may not support or assist any organization which discriminates on the basis of sex. The proposed regulation does not specify in more detail what organization, agencies or persons could not be supported by a recipient. It does, however, set out the major criteria which are (1) the substantiality of the relationship between the recipient and the organization (including financial support and housing) and (2) the closeness of the relationship between the organization's functions and the educational program or activity of the recipient (school)."

In later public and press conferences on these proposed regulations, Secretary Weinberger was quoted as saying that fraternities and sororities of a social nature, as compared to professional or educational, would not necessarily be required to have multiple sex membership because of these regulations, and also added that he did not think the regulations would tend to eliminate single sex organizations and that the purpose or intent of the regulations was not to do away with sororities and fraternities as they are presently constituted.

He added that each situation would be determined on a case by case basis and would depend on the substantiality of relationship and financial assistance.

Without too great an extent of interpretation, this could mean that universities would be prevented from having advisors to Greek letter organizations or letting them use campus facilities.

One of the most probable dilemmas on this, however, is that a number of Sig Chi chapters, as well as chapters of other similar organizations, do occupy university housing, either university dormitories or fraternity owned houses on university land, and sometimes Greek letter groups are required by the institution to occupy such housing. H.E.W. officials have commented, generally, that if rental is paid by the organization or members of "fair market value" that the Greek letter organization would not be considered to be benefiting from Federal funds. That also would seem to beg some interpretation, although there is no instance where fraternity members or fraternity chapters occupy such housing free of charge by any means. Would 99 year leases have to be reviewed each year to update the current interest charges?

And, even though these regulations have not taken effect, we have already had inquiries from several universities as to what our policy is on this matter, despite the fact that they have not taken effect, and it is likely that further questions will be asked, although no direct prohibitions or pressures have been applied by educational institutions thus far.

As many of you know, U.S. representative Joe D. Waggoner, Jr. of Louisiana and member of Kappa Sigma Fraternity, has been a spokesman for Greek letter organizations in such matters as these, and sponsored an amendment which became part of the Federal Civil Rights Act of 1964 and 1965 Higher Education Act which is pertinent here. That amendment prohibits the Federal government from inquiring into or controlling the membership practices of fraternities and sororities, and exempts them from regulation by that or any other act, including the recent sex discrimination law.

Representative Waggonner has felt that this would prevent H.E.W. from moving against social fraternities and sororities, but there is still a considerable amount of risk there, particularly since the Waggonner amendment is in a different though related act. Such an exemption thus far is not part of the sex discrimination law or the proposed regulations. And, even the Waggonner amendment to the 1964 and 1965 Acts still leaves fraternities "whose facilities are owned by the institution" excluded from that prohibition concerning Federal government involvement.

There do seem to be several ironies or interesting situations in the proposed regulations when one looks at the matter of institutions vs. private social fraternities.

For example, although recipient institutions are required to provide at least comparable housing for all sexes, the proposed regulations specifically state that institutions are not required to have both sexes housed in the same buildings. Yet, given some interpretation, fraternities could be placed in this situation. Although in government terms membership is not necessarily automatically correlated with housing, the concept of fraternity or sorority members living together in their own groups is inherent in the success generally of a fraternity chapter.

Furthermore, Title IX of the Education Amendments of 1972 adopted by Congress gives a specific exemption, in regards to admission, to any "public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex." If some institutions, and public institutions at that, are granted such an exemption, should it strain the imagination too much to have fraternities and sororities granted such an exemption as well?

I must apologize for the length of this document but we did feel that some background as well as comments as to the possible effect of this on fraternal organizations would be helpful in analyzing the material and the subject.

We are very concerned that the results of the proposed regulations could have undesired effects unintended by Congress, on private fraternal organizations, specifically but not entirely confined to those situations where the organizations are housed in facilities which are to one degree or another owned by the educational institution.

We will be happy to answer any questions you may have on this and welcome any assistance you may be able to provide on this matter.

At this point, it would appear that contacts from members of the Congress to H.E.W. are more likely to be effective than anything else.

We are enclosing copies of some related correspondence and material for your further information on this subject.

Fraternally,

WILLIAM T. BRINGHAM,
Executive Secretary.

MONTANA STATE UNIVERSITY,
Bozeman, Mont., October 16, 1974.

Hon. JAMES G. O'HARA,
House Office Building, Washington, D.C.

DEAR MR. O'HARA: I am writing to express my pleasure and appreciation for the fine speech which you delivered at the recent meetings of the American Council on Education in San Diego. I particularly liked the clear and straightforward way you presented the civil rights obligations of post secondary institutions. I have sent copies of your speech to several other administrators here because I think they will find it a helpful reference.

We all agree with what we believe to be the intent of the various pieces of civil rights legislation, and we are moving to implement the legislation as quickly as time and resources will permit. However, we do share your concern that the HEW guidelines in many cases appear to have gone beyond legislative intent. We also find that the guidelines require us to produce an enormous amount of paper work (at considerable expense in staff time and funds) which in some cases appears to have little or nothing to do with actual implementation of the legislation. It almost seems that the reasoning at HEW is that if enough reports and data are produced, something must be happening. In fact, it may well be the reverse, and all the paper work becomes a substitute for substantive achievements.

I was very pleased to hear that you and other congressmen feel that the proposed Title IX guidelines go well beyond legislative intent, and I certainly hope that Congress will disapprove these guidelines if substantial changes are not made.

For your information, I am enclosing a copy of our response to the Title IX guidelines. We did not attempt an exhaustive catalog of all the problems we see, but we did highlight a few and endorse the more detailed statements of the American Council on Education and the National Association of State Universities and Land Grant Colleges.

Sincerely,

IRVING E. DAYTON,
Vice President for Academic Affairs.

Enclosure.

MONTANA STATE UNIVERSITY,
Bozeman, Mont., October 9, 1974.

DIRECTOR, TITLE IX GUIDELINES,
Department of Health, Education, and Welfare
Washington D.C.

DEAR SIR: In response to your requests for comments on the draft guidelines for Title IX of the Education Amendments of 1972, we wish to submit the following from Montana State University, an institution that will be affected by the regulations and guidelines.

1. *General Comment:* Several educational and other professional associations are submitting aggregate comments based on input from their professional staffs and member institutions. I believe those recommendations will be generally sound and should be considered carefully before final guidelines are adopted. In particular, we support those views recommending more specificity, more examples in the guidelines, and positive indications that the provisions of 86.3 (Remedial and Armative Action) do, as we think they should, or do not apply throughout.

We also support the need for a clear and reasonable time frame for compliance (2–10 years depending on the complexity of the requirement) and the elimination of any reference or requirement in the regulations for textbook and/or curricula regulation.

SPECIFIC COMMENTS

2. *Section 86.32 Housing:* We believe it is unrealistic to expect any institution to ensure that off campus housing be equal for both sexes. We strongly suggest "ensure" be replaced by "actively encourage."

3. *Section 86.31:* This section would appear to consider fraternities and sororities, and some distinguished honor and service societies, as illegal if they use institution owned/leased facilities. The historic nature of these organizations and the contribution they make to a higher education experience would seem to qualify them for exemption from the regulations. Since exceptions are made for separate sex housing, it seems only fair that exceptions can also be made for fraternities/sororities and traditional honor societies (who often house as well as provid

other advantages to their members). The provisions in this area could be drawn so as to require equal opportunities for both sexes as in athletics and housing. Thus, both fraternities and sororities would have to be available or none allowed, and honor societies for both sexes or none.

4. *86.35 Financial Assistance:* The question of wills, trusts, scholarships and awards and the desexing of such will be extremely complex and sensitive. An extended period (8-10 years) should be granted to institutions to bring this area into compliance. Financial assistance bequests made prior to the guidelines will have to be dealt with by legal procedures. Only new ones, after a specific date, should be required to be in immediate compliance.

5. *86.38 Athletics:*

a. This section has become one of the most controversial. At a minimum, the provision for annual poll taking to determine athletic programs should be dropped or limited to intramural programs rather than intercollegiate sports. The impact of an annual poll on hiring of coaching staff, purchase and use of facilities and equipment, on scheduling, and on revenue possibilities via radio and TV contracts, etc. would be chaotic. Institutions should offer the athletic programs that most benefit the student, the area, the institution, etc. and decide this under the policies of the institution's governing board, not on the basis of a plebiscite.

b. The question of the applicability of these regulations to intercollegiate sports, most of which do not directly use federal funds, is likely to be challenged. We believe that since intercollegiate sports are part of an institution's overall program, that the intent of the regulation is and should be to include them, but that inclusion should be reasonable and allow for disproportionate spending. The sport of football, for example, is costly yet often an important revenue producer for all other athletic programs. As we read the regulations, they do not require both sexes access to intercollegiate football teams; on the other hand, they do require that other athletic opportunities be provided for women at a fund expenditure level that is equitable, not in total cost but concept. How precise that equality must be, however, is vague and the guidelines should provide clear examples. The guideline examples should include the concept that intercollegiate and intramural athletic teams should be open to both sexes, as well as separate but equal teams, where practical; i.e., track, tennis, swimming, marksmanship, etc.

6. *Subpart E—Employment Discrimination.* In this area Title IX is quite similar to Title VI and other federal provisions. We recommend that any duplication be eliminated as it often leads to time consuming and wasteful duplicate reports and fact gathering efforts.

7. *Part Time Benefits, 86.41:*

a. This section appears to go beyond the intent of the regulations to prevent sexual discrimination in that it can be interpreted to require payment of all fringe benefits to all part time employees. There is no definition of part time employees, which would seem necessary. It would be preferable to redesign this to prevent denial of fringe benefit participation because of sex and leave it to the institutions, subject to other laws, to decide what degree of employment determines fringe benefit participation.

8. *Section 86.61:*

d. The section on access to enforcement officials of institution sources of information in regard to compliance and investigation has no statutory authority to back it up. Second, the statement indicates a lack of sensitivity to the very important subject of constitutional privacy, civil libery and the national concern about excessive Federal Agency demands for confidential and personal information. There should be some clear guidelines and limitations on access

In summary, at Montana State University we believe the draft guidelines need considerable specificity and clarification. We believe the intent of the rules to eliminate sex discrimination meets the approval of all educational institutions. With reasonable interpretations and reasonable time for compliance, the rules can be successfully implemented and will achieve their goals. This can be accomplished only by careful and clearly defined enforcement; enforcement that recognizes the costs in manpower and finances that will have an impact on the institutions, most of which are already experiencing difficult financial conditions. Patience and fairness must characterize the efforts of all.

Sincerely yours,

CARL W. MCINTOSH, *President.*

MICHIGAN TECHNOLOGICAL UNIVERSITY,
Houghton, Mich., October 14, 1974.

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR REPRESENTATIVE O'HARA: You are no doubt aware of the amount of interest the educational industry has expressed in the proposed regulations to implement Title IX of the Higher Education Amendments of 1972.

Attached is a copy of our response to the proposed regulations. Perhaps after reviewing our comments you can better understand our concern over the possible impact of these regulations on the industry.

Sincerely,

R. L. SMITH, *President.*

Attachment.

MICHIGAN TECHNOLOGICAL UNIVERSITY,
Houghton, Mich., October 14, 1974.

DIRECTOR OF THE OFFICE FOR CIVIL RIGHTS,
Department of Health, Education, and Welfare,
Washington, D.C.

DEAR SIR: Attached are comments your office requested on the proposed regulations to implement Title IX of the Higher Education Amendments of 1972.

Please note that our response contains two major sections. In the first section we have commented by appropriate subsection number on those provisions we feel require additional consideration before final promulgation.

The final section is a reply to your invitation to comment on retirement benefits, part-time employment, fringe benefits, and textbook content as they may be affected by the proposed regulations.

Sincerely,

R. L. SMITH, *President.*

Attachments.

86.32 (C) (2) HOUSING

This provision, as written, could require an institution to "insure" equality in off-campus housing. It is beyond our capability to insure equality of off-campus housing, therefore the regulation should be changed to read "encourage" equality of off-campus housing.

86.35 (A) FINANCIAL ASSISTANCE

This provision, as written, would prohibit single-sexed scholarships, fellowships, or other forms of financial aid to students and the University. An institution could expect to lose a significant portion of its financial support from wills, trusts, or other bequests if it would be required to legally change existing agreements. The legal costs involved in this procedure, particularly for those institutions without a legal staff, would undoubtedly suggest this type of financial support for the student be abandoned.

New language should be proposed that would require an institution to show evidence indicating it had endeavored to dissuade donors from originating potentially discriminating awards. This provision should only apply to financial aid received after the effective date of the official regulations.

86.41 (A) (1) EMPLOYMENT

This provision, as written, is unclear as to whether the "either/or" approach in section 86.46 (b) (2) would be permissible in providing fringe benefits for part-time employees proportionate to those offered permanent full-time employees. It is also unclear as to exactly what fringe benefits would be affected. Thus we ask for clarification of the definition of "proportionate fringe benefits". If the benefits themselves must be prorated, it is difficult to see how programs not directly geared to salary would be prorated. Such programs could be prorated on the basis of cost, but this section does not indicate whether this would be acceptable.

86.46 (B) (2) FRINGE BENEFITS

This provision, as written, allows colleges and their staff to have a choice in the type of retirement plan they pay for and participate in. Both types of plans allowed under this provision are widely used and considered fair by employers in business, industry and higher education. We strongly support this provision as written.

RETIREMENT BENEFITS

The Secretary has invited comments on the possibility of adopting the Title VII approach or the "unisex" approach to this provision of the retirement fringe benefits.

Our major concern with the Title VII approach, is that employers would be required to make larger contributions for women than for men earning equal pay.

Alternatively, if HEW were to adopt the "unisex" approach, this would eliminate the institution's right to choose what type of pension arrangements best suits its needs and those of its employees. This approach would require that differences in male and female logevity be ignored in the pricing and payment of benefits. "Unisex" advocates would fashion a new mortality table, showing a single mortality rate for men and women at each age, and setting this rate at whatever level is most likely to produce enough in mortality gains from the men to cover the mortality losses from the women. In reality, this would be a transfer of benefits from men to women.

It has been pointed out to the University that nowhere has it been established that actuarial tables, based on statistically valid mortality rates and the scientific application of laws of probability, discriminate against anyone. Rather, such tables are a two factor method of separating annuitants by expected duration of life, and therefore expected duration of payments. The fact that age and sex are the two objective and statistically reliable factors used in determining expected rates of mortality should not be construed as unreasonable or unlawful discrimination between men and women any more than it should be construed as unreasonable or unlawful discrimination between young and old people.

We feel that employers should continue to have the choice of providing either actuarially equal benefits or equal monthly benefits and that the latter choice should include the right to equalize monthly benefits on the basis of realistic mortality rates for men and women.

For all these reasons, this university believes that the either/or approach already in the proposed guidelines for implementing Title IX, Section 86.46(b)(2), best accommodates the needs of higher education while also accommodating the letter and spirit of present and perspective equal employment opportunity legislation.

PART-TIME EMPLOYMENT

The University would like to express its concern over Secretary Weinberger's definition of "permanent part-time employees".

This institution has four general categories of employees. They are:

1. Regular full time—those employees who work or are intended to work at least 9 consecutive months at forty hours per week.
2. Regular part time—those employees who work or are intended to work at least 9 consecutive months at less than forty hours per week.
3. Temporary—those employees who are intended to work less than 9 consecutive months, regardless of number of hours worked per week.
4. Students—those employees whose major intent is the pursuit of an education and whose employment is secondary to this pursuit. Students are not allowed to work over twenty hours per week except during vacations and semester breaks.

Since we provide proportionate fringe benefits to our regular part-time employees, we can support the concept of including these employees in the regulations. However, we feel that the proposed definition is much too liberal because:

1. One academic semester is too short a time span for an employee to be considered "permanent".
2. Since full-time students' jobs are secondary to their education, they should be considered a separate group of employees and not included in this definition.

Therefore, we recommend that the time period be extended and that there is a clear understanding that students are not included in the definition of permanent part-time employees.

PART-TIME EMPLOYMENT AND FRINGE BENEFITS

The Secretary has also invited comments on the possibility of requiring institutions to provide proportionate fringe benefits to all "permanent part-time" employees. The regulations, as written, are unclear as to what fringe benefits include. Thus we ask for clarification of the Secretary's definition of proportionate fringe benefits.

Since we do provide hospitalization and life insurance to our regular part-time employees, this university sees no difficulty in complying with any provision requiring institutions to provide proportionate fringe benefits to permanent part-time employees, providing that the definition of permanent part-time employees is changed.

We would be opposed to regulations which would require providing proportionate fringe benefits to students working half time (twenty hours per week), because the cost of such provisions and our problems with employee turnover as it affects our hospitalization enrollment would be greatly amplified.

We highly recommend that students be a separate classification of employees, still subject to the provisions of the proposed regulations on sex discrimination but not compared with regular employees in regards to fringe benefits.

TEXTBOOK CONTENT

We wish to support any reasonable effort designed to eliminate "sexism" in textbooks and other materials used in the educational process. However, before the federal government and educational institutions become involved in a joint effort, there should be a mutual understanding of what constitutes "sexism" in these materials.

The lack of any mutually agreed upon guidelines defining "sexism" could only bring about large scale revisions in existing materials which would lead to increased cost in the educational process, which we all must remember is paid for by the students.

ALPHA OMICRON PI,
Nashville, Tenn., October 4, 1974.

Congressman JAMES G. O'HARA,
Chairman of the House Special Subcommittee on Education,
Washington, D.C.

DEAR CONGRESSMAN O'HARA: I am enclosing a copy of my letter for Alpha Omicron Pi sorority to Mr. Caspar Weinberger, Secretary-Health, Education, and Welfare.

We, like other women's voluntary organizations, are vitally concerned with the proposed regulations for the implementation and interpretation of Title IX of the Educator Amendments of 1972.

Sincerely,

ADELE K. HINTON
(Mrs. Frederick W.)
International President.

ALPHA OMICRON PI,
Nashville, Tenn., October 2, 1974.

Mr. CASPAR WEINBERGER,
Secretary, Health, Education, and Welfare,
Washington, D.C.

DEAR MR. WIENBERGER: Alpha Omicron Pi sorority is a voluntary, women's social organization of college women, 55,000 undergraduate and graduate members with chapters on 85 college campuses and numerous alumnae groups. We are members of the National Panhellenic Conference. Campus involvement, community service, scholarship achievement, and leadership opportunities are the basis of our organization. Our organization and its various activities is financed exclusively by our members. We are, however, necessarily involved in a working relationship with the universities and colleges where we have chapters.

The officers and membership of Alpha Omicron Pi are greatly concerned with the proposed regulations of HEW, published on June 20, 1974 for the interpretation and implementation of Title IX "Prohibition of Sex Discrimination" of the Educational Amendments of 1972—specifically with Section 86.31(b)(7).

The above proposed regulation, on its face, lends itself readily to an interpretation that would prohibit a voluntary, women's organization such as ours from restricting its membership to women. While we must assume that it is not your purpose to prohibit a voluntary women's organization from restricting its membership to women the regulation as proposed needs to be clarified on this point. We must, therefore, protect the regulation as drawn and request that it be clarified.

If the above proposed regulation is to be continued in its present form, it must be regarded as invalid because it exceeds and, in fact, is contradictory to the standards provided by Congress in the 1972 Educational Amendments. The inconsistency, and therefore the invalidity, is made even clearer when the 1972 Educational Act is viewed against Section 804(b) of the Higher Education Act of 1965.

Since there is no indication that Congress contemplated prohibiting a women's voluntary organization from restricting its membership to women, the regulation in question would have to be treated as invalid and contradictory to the basic legislation as passed by Congress.

It is well recognized, of course, that a voluntary association, such as ours, is fundamentally protected in its right of association by the First Amendment and other provisions of the Constitution of the United States. This must be regarded as important in interpreting the scope of the statute as passed by Congress. If the statute were given a contrary meaning through the issuance of regulations, the regulations would be in conflict with the Constitution.

The objective of the legislation as passed by Congress was to expand opportunities for women—not curtail them—this we applaud. It would be incongruous indeed to issue regulations under such a statute that would prohibit a voluntary women's organization from restricting its membership to women.

In light of the purpose of the legislation to further opportunities for women, the regulations should not be left to a "case by case" interpretation so many times mentioned in Regional meetings of HEW this summer. We, therefore, request a specific clarification for voluntary women's organizations such as ours.

Sincerely,

ADELE K. HINTON,
(Mrs. Frederick W.)
International President.

TAU KAPPA EPSILON INTERNATIONAL FRATERNITY,
October 5, 1974.

Mr. PETER E. HOLMES,
Director, Office of Civil Rights,
Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. HOLMES: Attached is a copy of the resolution adopted by the Grand Council (Board of Directors) of Tau Kappa Epsilon International Fraternity regarding Title IX and the proposed regulations as published on June 20, 1974, in the Federal Register.

It is the opinion of our Fraternity that the proposed regulations are definitely efforts on the part of the Department of Health, Education, and Welfare to expand upon the intent of the legislation of the Higher Education Act. The Waggoner Amendment of 1965 to the Higher Education Act as well as Title V of the Civil Rights Act of 1964 exempts the practices and internal operations, including membership selection, of fraternal organizations from the interference, supervision, or control of agencies of the Federal Government.

We request a positive statement from the Department that fraternities and sororities are still specifically exempt from any harassment by employees of the Department of Health, Education, and Welfare, and that these organizations cannot be used as the threat (to withhold federal funds) to university presidents and administrators.

Sincerely yours,

T. J. SCHMITZ, *Executive Director.*

Enclosure.

RESOLUTION ADOPTED BY THE GRAND COUNCIL OF TAU KAPPA EPSILON INTERNATIONAL FRATERNITY

Whereas Tau Kappa Epsilon International Fraternity has over 300 chapters with more than 16,000 undergraduate members in Institutions of Higher Education throughout the United States; and

Whereas Tau Kappa Epsilon is a private membership organization dedicated to securing benefits, intellectual, social, and moral, from a closer fellowship among male students in good standing on campuses where chapters are established; and

Whereas Tau Kappa Epsilon does not, nor has it ever, restricted membership on artificial barriers of Race, Creed, or National Origin; and

Whereas the goal of Tau Kappa Epsilon is to augment the formal education derived through the classroom and further broad educational purpose of the Institution by promoting loyalty and pride; and

Whereas the educational value of fraternities as an adjunct to a well-rounded education have long been recognized by such institutions with relationships established at each school; now, therefore, be it

Resolved by the Grand Council of Tau Kappa Epsilon International Fraternity, That it is the clear intent of Congress that the provisions of Section 804(b) of Higher Education Act of 1965 continue to be in full force and effect and that Title IX and the proposed regulations as published on June 20, 1974, in the *Federal Register* have no bearing on or meaning with respect to Tau Kappa Epsilon; and be it further

Resolved That the Department of Health, Education, and Welfare refrain from implementing the proposed regulations to the detriment of the educational benefits to be derived from the partnership philosophy developed carefully over the years on many college and university campuses; and be it further

Resolved That copies of this resolution be disseminated to all chapters of Tau Kappa Epsilon, all Institutions which host chapters of Tau Kappa Epsilon, all Alumni members of Tau Kappa Epsilon, Members of Congress, and all other parties interested in preserving the freedom of Institutions of Higher Education to determine how they can provide the best educational experience for their students.

T. J. SCHMITZ,
Executive Director.

THE PROFESSIONAL INTERFRATERNITY CONFERENCE,
October 7, 1974.

Hon. JAMES G. O'HARA
House of Representatives,
Washington, D.C.

DEAR SIR: We shall appreciate your using your good offices as a member of the House Committee on Education and Labor to obtain a revision in the proposed regulation implementing Title IX of the Education Amendments of 1972 in line with our comment to the Office for Civil Rights, enclosed.

Since the deadline for public comment on this subject is October 15, 1974, your prompt action on this matter is of great importance to us.

Thank you very much.

Respectfully yours,

ERWIN SMALL, *President.*

Enclosure.

THE PROFESSIONAL INTERFRATERNITY CONFERENCE,
October 7, 1974.

Mr. PETER E. HOLMES,
Director, Office for Civil Rights, Department of Health, Education, and Welfare, Washington, D.C.

DEAR MR. HOLMES: On behalf of the member fraternities in the Professional Interfraternity Conference, we submit this letter as a comment on the proposed regulation implementing Title IX of the Education Amendments of 1972, published in the Federal Register, June 20, 1974.

Background Information: Established in 1928, the Professional Interfraternity Conference has as members twenty-five national fraternities in eleven professional fields. These fraternities have initiated over 950,000 members through more than 1500 collegiate chapters.

The PIC recognizes the right of each fraternity to determine its own membership requirements—a right protected from federal control by the Waggonner Amendment (Section 804(b) of the Higher Education Act of 1965). Although some of our member fraternities admit members of both sexes, others do not. We see the proposed regulation and summary statement as going far beyond the provisions of the law and representing indirect encroachment into the membership practices and internal operation of privately funded organizations. Establishment of such a precedent would pose a substantial threat to the future of these organizations.

We note with interest that women's fraternities, which are appropriately interested in equality of opportunity for women, also oppose this proposed regulation.

Relationship to Institutions of Higher Education: In regard to admissions, single-sex private undergraduate schools are exempted in the law, as are also public undergraduate schools with such traditional regulations. Therefore, it is logical that fraternities with the same traditional regulations should be exempted. Such exemption should be specific in the regulation in order to avoid inconsistent interpretations. To study each case individually would result in exorbitant expenditures by the Office for Civil Rights, the institutions, and the organizations. Despite Section 804(b) of the Higher Education Act of 1965, the summary statement of the proposed regulation alone mentions that Paragraph 86.31(b)(7) might apply "to official institutional sanction of a professional or social organization." This is contrary to your written and spoken comments on the application of the proposed regulation.

We know of no case in which a fraternity is financially supported by an institution. No fraternity operates as a monopoly preventing other fraternities admitting the other or both sexes from equal access to the school's benefits.

Recommended Revision of the Proposed Regulation: We propose that the regulation be revised to make Paragraph 86.31(b)(7) read: "Aid or perpetuate discrimination against any person by substantially assisting any agency, organization (except any fraternal organization, fraternity, sorority, private club or religious organization which is financed from funds derived from private sources), or any person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees; or".

Further we propose that the summary statement be revised by deleting from the remarks relating to Paragraph 86.31(b)(7), the words "or to official institutional sanction of a professional or social organization."

Such revisions would clarify the regulation in line with the Waggonner Amendment which is already applicable.

Respectfully submitted.

ERWIN SMALL, *President.*

DELTA DELTA DELTA,
Indianapolis, Ind., October 6, 1974.

DEAR REPRESENTATIVE O'HARA: I wish to urge you and your committee, the House Special Subcommittee on Education, to support exemption for fraternities and sororities under guidelines proposed by HEW to implement Title IX of the

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Educational Amendments of 1972. These guidelines as proposed at present do not make an exemption for fraternities and sororities. These guidelines are unclear and would be subject to different interpretations by Regional offices of HEW. Furthermore, these guidelines are contrary to Section 804(b) of the Higher Education Act of 1965. I hope you will do everything you can to gain this exemption.

Sincerely,

DONNE SCHAEFFER.

OKLAHOMA CITY, OKLA., *October 2, 1974.*

Hon. JAMES G. O'HARA,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN JAMES G. O'HARA: I am writing on behalf of Sigma Nu Fraternity on a matter which affects a large number of your constituents who belong to this Fraternity and to other college social fraternities and sororities.

The proposed regulations published on June 20, 1974 for the interpretation and implementation of Title IX of the Education Amendments of 1972 are an attempt on behalf of the Department of Health, Education, and Welfare to do indirectly what the Congress of the United States has clearly denied them the right to do directly.

Specifically the regulations in Part 86 attempt to regulate the membership practices which have existed for approximately two hundred years in the social fraternity system in this nation.

This is in clear violation of the Waggonner Amendment of 1965 to the Higher Education Act. It is also in violation of Title V of the Civil Rights Act of 1964 which exempted the membership practices and internal operations of fraternal organizations from the supervision or control of Federal agencies.

As the attached protest to the Department of Health, Education, and Welfare indicates Sigma Nu Fraternity believes the proposed regulations would be an unlawful intrusion upon the legislative powers of the United States Congress and upon the constitutionally guaranteed rights of the citizens of this nation. We ask your intervention on behalf of your constituents who are members of college social fraternities and sororities.

Sigma Nu Fraternity was organized in 1869. It has 147 Chapters located in many of the famous unversities and colleges of the nation. They are scattered from the East to the West Coast, one in Canada, and they reach down to the Gulf of Mexico. Sigma Nu is one of the largest but not the largest fraternity in the nation. Millions of people are involved.

Respectfully submitted for your consideration,

ERRETT R. NEWBY,
Past Regent (National President).

In summary, we believe that the proposals proposed on June 20 are unlawful and unworkable. We believe they will cause considerable harm. We also believe that they are a clear and undeniable attempt on the part of the Department of Health, Education, and Welfare to broaden beyond reson the intent of the legislation and therefore constitute an infringement of the right of Congress to enact the laws which govern this nation. These regulations should be revised in conformity with these and related objections.

Respectfully submitted,

WILLIAM K. AMIOTT, *Executive Secretary.*

INDIANAPOLIS, IND., *October 2, 1974.*

Representative JAMES G. O'HARA,
Chairman, House Special Subcommittee on Education,
Washington, D.C.

DEAR SIR: It is with deep concern that I call your attention to the proposed plans made by the Department of Health, Education, and Welfare to implement Title IX of the Educational Amendments of 1972.

There are several portions of these plans with which I disagree, but I call your attention specifically to Section 86.31. It implies infringement of an individual's right of association as guaranteed by the First Amendment to the United States Constitution. If this regulation is adopted as proposed, it would mean the destruction of many fine women's organizations, traditionally associated with institutions of higher education, such as Mortar Board and Alpha Lambda Delta (leadership honoraries) and Mu Phi Alpha and Phi Chi Theta (professional honoraries).

I call your attention also to Section 86.62 which sets up a system whereby recipients (schools) are guaranteed the right of counsel or appeal. There is no similar guarantee of right of appeal for the Complainants (for example, a woman's honorary society).

Section 408 B of the Higher Education Amendment of 1965 (The Waggonner Amendment) specifically forbids any department, agency, officer or employee of the United States to exercise any direction or control over membership practices or internal operations of any fraternity organization, sorority, private club or religious organization at an institution of higher education financed exclusively by funds derived from private sources and whose facilities are not owned by such institution. With the adoption of the proposed regulations to Title IX it would appear that HEW is attempting to accomplish indirectly what it is strictly forbidden by Congress to accomplish directly.

It would appear that HEW has overextended its authority and distorted the intent of Congress.

I ask, please, that your committee review these proposed plans to implement Title IX before they become law.

Sincerely,

DOROTHY M. SKINNER, (Mrs. G. W.).

ALPHA TAU OMEGA FRATERNITY,
Champaign, Ill., October 7, 1974.

Hon. JACK KEMP,
*U.S. House of Representatives,
Washington, D.C.*

DEAR CONGRESSMAN KEMP: I write to you today because of a very real concern voiced by members of Alpha Tau Omega Fraternity, and indeed all fraternities as well as sororities, growing out of proposals by the Office of Civil Rights, toward implementing Title IX of the Amendment Acts of 1972, with specific reference to part 86, released on June 20 of this year.

To best summarize the issues, I have enclosed several pieces of correspondence and articles reviewing our problem and of the particular conflict the HEW regulation proposals have with Section 804(b) of the Higher Education Act of 1965, which we understand is binding and specifically protects fraternities and sororities.

"804(b). Nothing contained in this act or any other act shall be construed to authorize any department, agency, officer or employee of the United States to exercise any direction, supervision, or control over the membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education (other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are owned by such institution."

It is our contention that Title IX was not designed to license HEW to assert jurisdiction over all fraternities and to otherwise infringe upon the constitutional rights of Alpha Tau Omega and other fraternal organizations so long as membership was open without regard to race, color, creed or national origin. Rather the original legislation seemed designed to discourage sex discrimination in admissions, employment and equal opportunity in programs, in academic institutions support wholly or partly with Federal funds.

While Title IX does not refer directly to fraternities and sororities, it is clear from several reports that HEW supports interpretation clearly in violation of Section 804(b) of the Higher Education Act. One suggestion, therefore, would be to include in the final language of Title IX the same exemption protecting fraternal organizations under prior acts, to read as follows:

"Nothing in these regulations or any others implementing Title IX shall be construed as authorizing the Department of Health, Education, and Welfare, its agencies or its officers, or any person under the supervision or control to inquire into or investigate any membership practices of internal operations of any college or university, fraternity or sorority."

As I understand, you are a member of the House sub-committee studying the proposal and a member of Alpha Tau Omega which will be directly affected by the implications and encroachments suggested by Title IX, I plead your intervention and support to the rights we believe clearly protect Alpha Tau Omega and all fraternities and sororities.

Sincerely,

NORMAN E. RITCHIE.

Enclosures.

FRATERNITY AND BIG BROTHER

Over the past ten years the fraternity/sorority system has moved through a series of crises which may have profoundly affected its very existence. This is an attempt to explain and document the developing problems now confronting the private social organizations to which many college students belong.

Beginning in 1963 the U.S. Commission on Civil Rights began a widespread inquiry, using a lengthy questionnaire, into membership selection policies of fraternities and sororities. As a result of the very obvious invasion of privacy into the internal affairs of private social organizations, fraternity leaders as well as many Congressmen expressed grave concern which resulted in what has become known as the Waggonner Amendment to the Higher Education Act of 1965, or in precise terms, Section 804(b), Public Law 89-323, 79 Stat. 1219, November 23, 1965.

Through the intervening years gradual encroachments have continued, usually in the form of required statements denying discrimination on the basis of race, color, creed, or national origin—suggested by a team from HEW—as seen in a letter from E. Garth Jenkins, Assistant Dean for Fraternities, Auburn University, Nov. 27, 1973. Recently, however, as a result of Title IX—Prohibition of Sex Discrimination, a part of the Education Amendments of 1972, Public Law 92–318, 92nd Congress, S. 659, June 23, 1972, educators and administrators, after a visit by Department of Health, Education, and Welfare or the Office of Civil Rights officials, have requested—some have demanded—fraternities and sororities deny discrimination on the basis of race, color, creed, national origin or *sex*, which is clearly documented in a memo from Gary M. Penfield, Dean of Students Groups and University Programs for the University of Cincinnati, February 21, 1973. No great concern was noted until two news items appeared in recent months (THE WASHINGTON POST, 4–18–74, "Delta Sigma Pi Seeks Reversal of HEW Ruling" and THE DALLAS MORNING NEWS, 4–20–74, "Big Brother Invades SMU This Fall"), as very real threats to the system. These two actions, initiated by HEW, reveal a program of DIRECT and INDIRECT involvement into the internal affairs of fraternal organizations expressly prohibited by Congress—

> Nothing in this Act or any other Act shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over membership practices or internal operations of any fraternal organization, fraternity, sorority, private club or religious organization at an institution of higher education) other than a service academy or the Coast Guard Academy) which is financed exclusively by funds derived from private sources and whose facilities are not owned by such institution.

HEW, explaining the proposed regulations implementing Title IX, published in the Federal Register, June 20, 1974, claims that an institution (a recipient school) may not assist or support a discriminatory organization, and in determining whether or not there is assistance they will look at the substantiality of support, financial support or quantum support, plus the relationship of the organization to the educational mission of the institution. In short, HEW officials have declared that any organization which is discriminatory and which is assisted by the institution would be forbidden by the proposed regulation—fraternities and sororities may not discriminate by sex in membership selection.

By requiring recipient schools to produce "Positive Action Reports," HEW is subtly and indirectly trying to encompass student groups into an imagined "close relationship" to the educational mission of the institution. The so-called "services" support" or "assistance" is in fact available to all students as individuals or in small groups (Supra, Univ. of Cincinnati).

Fraternities and sororities receive no Federal funding and pay rental fees as any other students do for dormitory or similar facilities. In most cases these organizations are domiciled in private housing, on private land, derived from private funding. Whatever services are rendered by an institution for associational activities are regulatory and liaison as to the fraternity/sorority system, so payment for such functions can in no sense be characterized as funding of fraternities and sororities.

HEW, according to Mr. Holmes, claims, "The operative language in Section 804(b) is ". . . financed exclusively by funds derived from private sources and whose facilities are not owned by such institution." HEW ignores the Intent of Congress as expressed in the following:

EXTRACT—CONGRESSIONAL RECORD—PAGE 26711—OCTOBER 20, 1965
89TH CONGRESS—FIRST SESSION

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Mr. WAGGONNER. * * * The language in the conference report has been modified somewhat as compared to House language, inasmuch as the Senate adopted a little bit different version from that which the House adopted. In an effort to make legislative history and to clarify the subject in my own thinking, I should like to ask a couple of questions.

It is my understanding that the amended language of the conference report of section 804(b), privately owned facilities on long-term leased land would be exempt from any Federal supervision. Also it is the intention of this language to prevent the subsidy of these organizations with public funds. Am I correct?

Mr. POWELL. The gentleman is absolutely correct.

Mr. Waggonner. Then, to further prohibit the subsidy of these organizations, with public funds, a fair service and/or rental charge must be charged any organization which might use public facilities. Am I correct?

Mr. Powell. Absolutely correct.

Mr. Waggonner. I thank the gentleman for yielding and for his clarification.

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HEW is seeking a list of Delta Sigma Pi Fraternity chapters so that the schools, where these chapters are located will be notified that the institution must demand an end to discrimination by sex in membership selection by the fraternity, or the schools will be faced with a cut-off of Federal funding for their educational programs.

HEW has interpreted the Education Amendments of 1927 to include fraternities as an activity contemplated within the statute. HEW is actually conducting a hearing into membership practices of a fraternity. The response to the Delta Sigma Pi court action, by the United States Attorney in Chicago, clearly shows an intent to pursue this matter of inquiry into membership selection, administratively within the Department of Health, Education, and Welfare. Likewise, the same motive can be clearly seen in the announced plan to monitor rush and membership selection at Southern Methodist University.

No responsible women's sorority is in favor of accepting male members—the same holds with men's fraternities, they do not wish to have to select female members.

HEW, by requiring recipient schools to demand revision of membership selection by fraternities and sororities, is attempting to do indirectly that which it cannot do directly. HEW is deliberately determined to ignor the prohibition against such actions as are defined in the Waggonner Amendment.

The Waggonner Amendment, Section 804(b), is still in full force and effect; Congress never intended the Education Amendments of 1972 to be interpreted so as to repeal 804(b)—if it had, it would have repealed it as it did several laws—thus, HEW is wrongfully interpreting the Education Amendments of 1972.

Rochester Community Schools,
Rochester, Mich., October 14, 1974.

Dear Legislator: The following concerns of the Rochester Board of Education regarding the proposed anti-sex discrimination regulations proposed by the Department of Health, Education and Welfare are being sent to you for your information. Whatever steps you can take in implementing the suggestions prior to the regulations being adopted, would be greatly appreciated.

Sincerely,

John H. Peterson,
Secretary, Board of Education.

Enclosure.

ROCHESTER COMMUNITY SCHOOLS, ROCHESTER, MICH., OCTOBER 7, 1974

COMMENTS ON PROPOSED RULES GOVERNING EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITTING FROM FEDERAL FINANCIAL ASSISTANCE

Section 86.31(c).—"Programs not operated by recipient. (1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments."

Our interpretation of this section is of concern to us in the area of cooperative employment. It is our opinion that a school with a work-study or cooperative education program will be out of compliance if the cooperating agency or company discriminates by sex. It is our opinion that many students now benefit from our cooperative arrangements with employers in our area. It is conceivable that some of these extremely worthwhile programs would have to be terminated under this proposed regulation. We feel that this would not be in the best interest of our students.

Section 86.33.—"Separate toilet, locker room and shower facilities on the basis of sex may be provided, but such facilities as are provided must be comparable in quality and number for men and women."

Compliance with this section would require considerable expenditures of money which our district cannot afford. If this section is to be included in the regulations, it is our feeling that it should be applied only to the construction of future school buildings. If the rule is to be maintained as written, funding should be supplied to districts in order that they may comply.

Section 86.34(a).—"covers access to course offerings and other aspects of a recipient's educational program or activity. No course offerings may be conducted separately on the basis of sex including health, physical education, industrial arts, business, vocational, technical, home economics, music, and adult education, and no student may be required to participate or be refused participation in any course offering on the basis of sex."

It is our feeling that this proposed rule can be interpreted to mean that no course may be conducted in our district unless it contains members of both the male and female sexes. If, after making an effort to interest male students, for instance, in a course in advanced tailoring, we were unable to convince them to participate, we would not wish to have to cancel such a course. If our interpretation is correct, we strongly object to including this section, as presently worded, in these regulations.

Section 86.37(b).—"Pregnancy and related conditions. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, miscarriage, or abortion, or recovery therefrom, unless: (i) The student requests voluntarily to participate in a different such program or activity; or (ii) The student's physician certifies to the recipient that such different participation is necessary for her her physical, mental, or emotional well being."

The objection we have with this section relates to our liability for injury or illness to a student during pregnancy or related conditions. Therefore, we feel that the rule should be revised so that the student and her physician take the responsibility for her welfare, not the school district. It is our belief that the student and her physician should certify to the recipient that participation in education programs or activities, including physical education, is not injurious to the student's physical, mental, or emotional well being.

Section 86.38(c).—"Where athletic opportunities for students of one sex have previously been limited, a recipient must make affirmative efforts to inform students of that sex of the availability of equal oportunities for them, and to provide support and training to enable them to participate in those opportunities."

Our concern with this section is two-fold. First, we are again faced with much higher program expenditures in order to provide the "support and training" indicated. We would like to have the extent of such "support and training" defined. Secondly, since the need to document "affirmative efforts" is indicated elsewhere in the proposed rules, we would like specific information as to how such documentation is to be provided.

Section 86.46(b).—"Fringe benefits Prohibitions. A recipient shall not: (1) discriminate on the basis of sex with regard to making fringe benefits available to employees . . ."

If this section can be interpreted to mean the provision of paternity leave, we are concerned with its possible effect on contract agreements with teachers. We would like this section clarified and altered if, indeed, our interpretation is correct.

Approved at Special Board of Education meeting held October 7, 1974 of the Rochester Community Schools Board of Education.

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